

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1938.

No. 7213

325
David S. Newman
Darwin

WILLIAM H. NEILD AND J. EMERSON SAUER-
HOFF, CO-PARTNERS, ETC., PLAINTIFFS IN
ERROR,

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPO-
RATION.

IN ERROR TO THE MUNICIPAL COURT OF ~~THE DISTRICT OF~~
COLUMBIA.

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RATION, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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United States Court of Appeals for the District of Columbia

1 Municipal Court of the District of Columbia

No. 362,700

WILLIAM H. NEILD AND J. EMERSON SOUERHOFF, CO-
PARTNERS, ETC., *Plaintiffs*,

v.

DISTRICT OF COLUMBIA, a Municipal Corporation,
Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the Municipal Court of
the District of Columbia, at the City of Washing-
ton, in said District, at the times hereinafter men-
tioned, the following papers were filed and pro-
ceedings had, in the above-entitled cause, to wit:

2 *Particulars of Demand*

Filed June 14, 1938

The plaintiffs, William H. Neild and J. Emerson Sauerhoff co-partners, doing business under the name and style of Heild and Sauerhoff in the District of Columbia, sue the defendant, District of Columbia, a municipal corporation, for that heretofore to wit, on the 17th day of August 1937 there was approved by the Congress of the United States certain legislation described as the District of Columbia Revenue Act of 1937 and by the provisions of Title 6 thereof the said defendant by its duly authorized officials and pursuant to said Act did assert against the plaintiffs a business privilege tax for the purpose of issuing a license to the plaintiffs for one year expiring on June 30, 1938, and did assess a certain tax against the said plaintiffs predicated on the gross volume of business done by the said plaintiffs for the calendar year 1936 and required the said plaintiffs to file their return which they accordingly did and there-

upon did send to the plaintiffs a tax bill for the year 1937 and for the said license expiring on June 30, 1938 being bill No. 4791 which demanded payment of the said plaintiffs of the sum of \$241.10 as the first half of said tax, after a credit allowed thereon of \$43.79 for the tangible tax theretofore paid by the said plaintiffs as a subsequent date to pay the sum of \$284.89 as a second half of the said tax. Plaintiffs did thereupon fail and refuse to pay the said tax and penalties aggregating \$4.82 accumulated thereon and payment thereof was demanded by the District of Columbia and thereupon on December 29, 1937 the said District of Columbia by its duly authorized agent, Mr. F. D. Allen, the Assessor of the District of Columbia did by letter dated on the said 29th day of December 1937, received by plaintiffs in the due course of mail, notify the plaintiffs to

3 appear before the Assessor of the District of Columbia at 9:30 o'clock a. m. on the 3rd day of January 1938 to show cause why the license theretofore issued to the plaintiffs pursuant to the provisions of Title 6 of the aforementioned District of Columbia Revenue Act of 1937, approved August 17, 1937 should not be revoked for the non-payment of tax assessed against the plaintiffs; whereupon, on said January 3, 1938 at the stated time an appearance was made pursuant to said notice and cause was shown why said tax should not be paid but notwithstanding thereof said defendant, by its duly authorized agent, did rule that said tax was not illegal and void as to the plaintiffs as claimed by plaintiffs in their showing of cause and did order the license of the said plaintiffs to do business to be revoked without further notice on the following day, January 4, 1938. Whereupon by said order of revocation said plaintiffs were compelled to pay said installment of tax in the amount of \$241.10 with a 2% penalty thereon in the amount of \$4.82 or a total of \$245.98 which total amount plaintiffs did pay on the said 4th day of January 1938 by mailing payment in said amount involuntarily and under a complete statement of protest under date of January 3, 1938 directed to the Administrator of the Business Privilege Tax of the District of Columbia, the Assessor of the District of Columbia, the Collector of Taxes of the District of Columbia and the Commissioners of the District of Columbia.

Plaintiffs say that said payment made under the protest was involuntarily and was exacted under duress of the closing up of plaintiff's business and are advised and believe and therefore say that they are entitled to recover the amount of said payment together with a penalty included therein with interest and the costs of this action upon the ground that the said tax so exacted as aforesaid is unconstitutional and void.

4 Wherefore plaintiffs pray judgment against the said defendant in the sum of \$245.92 with interest thereon from January 3, 1938 besides costs of this action.

(S) ALVIN L. NEWMYER

(S) DAVID G. BRESS

Attorneys for Plaintiffs
Rust Building.

Further Bill of Particulars

Filed March 1, 1938

Come now the plaintiffs, William H. Neild and J. Emerson Sauerhoff, co-partners, doing business under the name and style of Neild and Sauerhoff, consenting to the motion for a better bill of particulars filed in the above entitled cause by the defendant, and say that the tax demanded of the plaintiffs by the District of Columbia is unconstitutional and void insofar as it applies to the plaintiffs herein for the reason that a substantial portion of the business in which the plaintiffs are engaged is interstate commerce and that the tax imposed upon the plaintiffs is a direct burden on such commerce to the extent that it prevents the plaintiffs' furtherance of such commerce and tends to prevent their entering into transactions involving such commerce. Other reasons and facts supporting plaintiff's position as to the alleged unconstitutionality of the tax appear hereunder. Facts tending to show these statements are the following:

1. Plaintiffs are engaged in the business of wholesale fruit and produce distributors in the District of Columbia and are duly licensed because of the interstate character of their business by the United States Department of Agriculture under the provisions of the Perishable Agricultural

Commodities Act (Stat.) having had issued to them on February 2, 1931 in the name of W. H. Neild and
5 Company, a Perishable Agricultural Commodities Act license No. 12434 and when the partnership name was changed from W. H. Neild and Company, who consisted of the same parties as involved herein, to Neild and Saueroff, the said license was reissued by the Perishable Agricultural Commodities Act as license No. 12434-A. By virtue of said license the plaintiffs are subject to the jurisdiction of the United States Department of Agriculture and their business is closely regulated by the said department, and the only authority for such regulation is the fact that said plaintiffs are engaged in interstate commerce. Of the volume of business sold by the plaintiffs two-thirds thereof is sold to persons out of the District of Columbia in interstate sales.

2. During the year 1936 more than \$3000 of gross sales was sold to persons out of the District of Columbia which goods so sold never reached the District of Columbia but were sold by order of diversion on track in other states to purchasers in other states without ever having reached the District of Columbia.

3. Of the gross sales made by the plaintiffs the margin of profit upon which the plaintiffs operated in 1936 amounted to a net income, without partnership salaries or withdrawals, of three and seven-tenths percent.

4. Plaintiffs further state that, because of the small margin of profit upon which the plaintiffs' business was operated during the year 1936, the tax imposed upon them under the Business Privilege Tax as referred to in the Particulars of Demand heretofore filed by the plaintiffs, is retroactive and confiscatory in that during the year 1936 said plaintiffs would not have entered into volume sales transactions on a small margin of profit had they known at that time that in the year 1937 and 1938 they would be called upon to pay a tax by virtue of said sales; that a portion of said sales is handled on a gross commission basis of 7% of
6 the selling price out of which only an even smaller percent than the average is retained as the net profit from such transactions which commission sales would not have been handled had the tax herein involved been anticipated in 1936.

5. Plaintiffs further say that the tax is not uniform in that other persons doing business of the same character in which the plaintiffs are engaged but dealing on a pure consignment and commission basis as distinguished from an outright purchase and sale basis are not required to pay a tax on the gross volume of sales notwithstanding that the net profit in such manner of dealing is far in excess of the profit made by the plaintiffs, and had the plaintiffs known or had reason to know of said tax, plaintiffs could likewise have conducted a consignment business in 1936 instead of an almost exclusive outright purchase and sale policy.

Wherefore plaintiffs say that the said tax is unconstitutional and void for the reasons as aforesaid and pray for judgment against the defendant with costs as claimed in the Particulars of Demand filed herein on January 19, 1938.

(S) ALVIN L. NEWMYER

(S) DAVID G. BRESS

Attorneys for Plaintiff
Rust Building.

Memo: Trial before Judge Raedy March 9, 1938

Case certified to Part 3 from part 6 and after conclusion of testimony taken under advisement.

Finding by The Court for the Defendant

Mins. 116, p. 77,
April 22, 1938:

Come now the parties hereto and thereupon after this cause is heard and submitted the court finds in favor of the defendant.

7 *Notation of Exceptions*

Filed April 21, 1938

Come now the plaintiffs in the above cause, by their attorneys and object to the ruling of the trial court in sustaining the defendant's motion for judgment and in overruling plaintiff's motion for judgment and note their exceptions to said rulings.

(S) ALVIN L. NEWMYER

(S) DAVID G. BRESS

Attorneys for Plaintiffs

Exceptions allowed as noted:

JUDGE ELLEN K. RAEDY

Motion for New Trial

Filed April 22, 1938

Come now the plaintiffs in the above entitled cause by their attorneys, Alvin L. Newmyer and David G. Bress and move this honorable court for a new trial.

Since there has been no express ruling by the court as to the grounds upon which the finding in favor of the defendant was made as of Tuesday, April 22, 1938, it is impossible for plaintiffs to specify the ground upon which the court is claimed by the plaintiffs to have committed error in finding against them. Consequently, in view of the point raised at the oral argument herein each of those points is specified as a ground upon which the court's ruling should have been in favor of the plaintiffs and are
8 separately asserted as the grounds for the new trial as follows:

1. Title 6 of the District of Columbia Revenue Act of 1937 imposes an undue burden on the interstate commerce in which the plaintiffs are engaged as shown by the undisputed evidence.

2. The said taxing act is unconstitutional as a burden on interstate commerce and Congress legislating for the District of Columbia does not have the power to burden such commerce to any greater extent than does the legislature of a state.

3. The taxing statute is so retroactive, arbitrary and confiscatory as to render it unconstitutional, since it relates to a taxable period wholly expired prior to the time when the statute was enacted.

4. The taxing act is discriminatory as applied to persons engaged in the same business and otherwise similarly situated and on that ground is unconstitutional.

5. The court committed error in sustaining the defendant's objection to the question asked of one of the plaintiffs by his counsel with respect to the competitive activities of others engaged in the same business and the manner in which such business is operated.

(The brief heretofore delivered to the court setting forth the legal authorities and arguments upon which the plain-

tiffs rely is requested to be considered as the legal authority supporting the propositions hereinabove stated in support of plaintiff's motion for new trial.)

Respectfully submitted,

(S) ALVIN L. NEWMYER

(S) DAVID G. BRESS

Attorneys for Plaintiff

Service of a copy of the foregoing motion for new trial acknowledged this 22nd day of April 1938.

(S) JO V. MORGAN

Special Assistant Corporation Counsel, D. C. in charge of tax matters.

9 *Memo: Motion for New Trial Overruled and Judgment for Defendant on April 29, 1938 and Exceptions Noted Thereto by Plaintiff.*

Mins. 116, p. 100,
April 28, 1938

Come now the parties hereto and thereupon after consideration of plaintiffs' motion for a new trial filed herein, it is ordered that said motion be and the same is hereby overruled. The plaintiff notes an exception to said ruling. Further Wherefore, it is considered that plaintiff take nothing by this action, that defendant go hence without day, be for nothing held and recover of plaintiff its costs of defense.

Judgment for Defendant with Exceptions Noted Thereto

Mins. 116, p. 100,
April 28, 1938.

Wherefore, it is considered that plaintiff take nothing by this action, that defendant go hence without day, be for nothing held and recover of plaintiff its cost of defense.

10 In the Municipal Court of the District of
Columbia

No. 362-700

WILLIAM H. NEILD, AND J. EMERSON SAUERHOFF, co-partners,
doing business under the name and style of NEILD &
SAUERHOFF, *Plaintiffs*,

vs.

DISTRICT OF COLUMBIA, a municipal corporation, *Defendant*.

Notice of Submission of Bill of Exceptions

To:

Elwood Seal, Esq.

Corporation Counsel, D. C.

Jo. V. Morgan

Special Asst. Corp. Counsel, D. C.

Glenn Simmon

Assistant Corp. Counsel, D. C.

Please take notice that the Bill of Exceptions on behalf of the plaintiffs, attached hereto, will be submitted to Judge Ellen K. Raedy, Municipal Court of the District of Columbia, on the 30th day of June 1938, for settlement approval and signature by the court.

ALVIN L. NEWMYER

DAVID G. BRESS

Attorneys for Plaintiffs

Service of a copy of the foregoing notice acknowledged this 15th day of June, 1938.

ELWOOD H. SEAL (Ct. S.)

GLENN SIMMON

Attorneys for Defendant

11 In the Municipal Court of the District of
Columbia

No. 362-700

WILLIAM H. NEILD, AND J. EMERSON SAUERHOFF, co-partners,
doing business under the name and style of NEILD &
SAUERHOFF, *Plaintiffs*,

vs.

DISTRICT OF COLUMBIA, a municipal corporation, *Defendant*.

Bill of Exceptions

This cause came on for trial before Honorable Ellen K. Raedy, judge of the Municipal Court of the District of Columbia on the 9th day of March 1938. The plaintiffs were represented by Alvin L. Newmyer and David G. Bress and the defendant by Jo. V. Morgan and Glenn Simmon. The following proceedings thereupon occurred in open court.

After opening statement to the court on behalf of the plaintiffs the following occurred:

"Mr. Bress. It is difficult to determine how to proceed with the evidence or to what extent. Most of it that may be offered pertains to matters about which there is no dispute.

The Court. You are really trying it on stipulated facts?

Mr. Bress. No, we have not stipulated.

Mr. Morgan. I do not think we ought to have any trouble. but I think you ought to make the record. This is the first case and it may be a very important case.

Mr. Bress. That is why I went into some detail in my opening statement, thinking probably it might be accepted as a stipulation of facts.

Mr. Morgan. I do not want you to go through a great deal of trouble. I think we might save time if you
12 put on your case. I will admit papers when you introduce them, but I do want to interrogate your witnesses about the business. It may be important. I do not mean the figures."

Thereupon, **J. Emerson Sauerhoff**, one of the plaintiffs in error, was called as a witness on his behalf and in the course of his direct and cross examination certain docu-

ments were received in evidence, the substance of said testimony and documentary evidence being as follows:

The plaintiffs in error, who will be referred to hereinafter as plaintiffs, have been engaged in the wholesale fruit and produce business as a partnership since February 1931; witness is one of the two partners thereof and his partner is William H. Neild; that the partnership holds all other licenses required by the District of Columbia laws; that the firm is engaged in interstate commerce and holds a license issued by the Department of Agriculture of the United States Government for which the firm is required by statute to pay a fee, under the Perishable Agricultural Commodities Act of 1930, which license in substance provides that the firm is licensed under the said Act to handle fresh fruits and fresh vegetables in interstate or foreign commerce as a commission merchant and/or broker; that the present license was issued to the firm on February 23, 1937 and was received in evidence as plaintiffs' Exhibit #1, and provides as follows:

“United States Department of Agriculture,
Washington, D. C.

This is to certify that Neild & Sauerhoff (a partnership existing of the above-named partners)”—and on the side appear the names W. H. Neild and J. Emerson Sauerhoff—
“of Washington, D. C., is licensed under the Perishable Agricultural Commodities Act, 1930, to handle fresh fruits and fresh vegetables in interstate or foreign commerce as
a commission merchant and/or dealer and/or broker
13 until such time as this license is suspended or revoked, as provided in said Act, or automatically terminated by failure to pay the annual fee.

Witness my hand this 23rd day of February, 1937.

Henry A. Wallace, Secretary of Agriculture,”

The firm has had a similar license since it began its business in 1931; that the type of business in which the firm is presently engaged is the same as that in which it was engaged during the entire year 1936 which consisted of buying and selling fresh fruits and produce; that the firm does not sell to retailers but sells only to wholesalers; the plaintiffs purchased the commodities and produce sold by them

in their business from shippers located outside of the District of Columbia; that of the goods purchased by the firm during the calendar year 1936 it sold during the calendar year 1936 \$77,044 of gross sales to firms out of the District of Columbia and \$64,679 in the District of Columbia. Of the volume of sales amounting to \$77,044 sold out of the District of Columbia, \$3,044.55 of such sales represented produce sold which never actually reached the District of Columbia but which was diverted on track before reaching the District of Columbia. The gross sales of merchandise for the year 1936 less sales returned and as shown by the Business Privilege Tax return filed by the firm and admitted in evidence as plaintiffs' Exhibit #2 shows gross sales amounting to \$141,723.70. After the allowance of the exemption of \$2,000 of gross receipts, the tax of $2/5$ of 1% of said gross receipts imposed under the Business Privilege Tax amounted to \$569.78. The Business Privilege Tax bill or statement received by the firm from the District of Columbia was received in evidence as Exhibit #3. The amount required to be paid for the first half under the said tax bill amounted to \$241.10. On December 29, 1937 the firm received a letter from the Assessor of the District of Columbia, which was admitted in evidence as plaintiffs'

exhibit #4, which sets out a notice to appear on January 3, 1938 at 9:30 o'clock in the morning at the District building to show cause why the license to do business issued to the firm should not be revoked for the non payment of the tax (the first half of the tax). Said letter contained the following:

"Government of the District of Columbia

Office of the Assessor

December 29, 1937

Neild & Sauerhoff,
1303-05 Water Street, S. W.,
Washington, D. C.

Gentlemen:

You are hereby notified to appear before the Assessor of the District of Columbia at Room 105, District Building, Washington, D. C., at 9:30 o'clock A. M., on the 3d day of

January 1938, and show cause, if any you have, why the license heretofore issued to you under the provisions of Title VI of the District of Columbia Revenue Act of 1937, approved August 17, 1937, should not be revoked for the non-payment of tax imposed by and assessed against you under said Title, as provided in said Title.

F. D. Allen, Assessor, D. C."

An appearance was made at the time specified and plaintiffs were allowed until the following day, January 4, 1938, to pay the first half of the tax or their license would be revoked. Accordingly, counsel for plaintiffs delivered a check in the amount of the first half of said tax as stated in the said tax bill, plus penalty in the amount of \$4.82, representing a 2% penalty at the rate of 1% a month for the months of December and January, which check was delivered to the Collector of Taxes for the District of Columbia in payment of the said first half, under protest. The following notation was made by the Assessor of the District of Columbia on January 3, 1938 on plaintiffs' exhibit #4, when the appearance was made at the Assessor's Office:

15 "Appeared Jan. 3, 1938. Demand made for payment no later than Jan. 4, 1938; otherwise, license to be revoked without further notice. C. A. Russell, Actg. Assessor, D. C."

The letter transmitting the plaintiffs' check in payment of the first half of the tax directed to the Administrator of the District of Columbia Business Privilege Tax, was admitted in evidence as plaintiffs' Exhibit #5 and stated that pursuant to the order revoking the license if the tax be not paid on or before January 4, 1938 and "in order to preserve their right to continue in business and to avoid the involuntary closing up of their business, the enclosed check is being delivered involuntarily and under protest, as having been exacted under duress, and you are advised that an action at law will forthwith be instituted to recover the amount thereof." Said letter was as follows:

"Enclosed herewith is check No. 4890 of Neild & Sauerhoff dated December 31, 1937, in the amount of \$245.92

drawn on the National Bank of Washington and payable to Collector of Taxes D. C. which is being delivered to you under protest as an involuntary payment of the first half of the Business Privilege Tax, Title VI of the District of Columbia Revenue Act of 1937, approved August 17, 1937, which amount includes a 2 percent penalty, together with enclosure of tax bill therefor.

Pursuant to written notice from the Assessor of the District of Columbia dated December 29, 1937 directed to Neild & Sauerhoff to appear at Room 105 District Building at 9:30 a. m. this morning, January 3, 1938, to show cause why the license issued to Neild & Sauerhoff should not be revoked, such appearance was made and cause shown and said Assessor directed said license to be revoked on tomorrow, January 4, 1938 without further notice if said tax be not paid 'no later than January 4, 1938'. Accordingly, in order to preserve their right to continue in business and to avoid the involuntary closing up of their business, 16 the enclosed check is being delivered involuntarily and under protest, as having been exacted under duress, and you are advised that an action at law will forthwith be instituted to recover the amount thereof."

The profits earned by the partnership for the calendar year 1936, without allowance of any withdrawals to the members of the partnership or any salary to them in the nature of a drawing account, represented a percentage of profit on gross sales which was calculated to be 3.7%. These figures and the general books of the partnership had been heretofore inspected by representatives of the District of Columbia. The witness was asked whether or not his competitors in the sale of the same type of products are engaged in business on a consignment basis, to which question counsel for defendant objected, which objection was sustained by the court and an exception allowed to plaintiffs. An offer of proof was thereupon made by counsel for plaintiffs, as follows:

"Mr. Bress. I propose to offer proof in support of the claim of unconstitutionality on the ground of the discriminatory character of the tax and to prove what the situation is with respect to other competing members in the same business, and the only manner in which that attack would be

shown by evidence would be to show what type of business the others are engaged in, if this witness has personal knowledge of that type of business.

Mr. Morgan. What difference does it make?

The Court. I will grant you an exception.

Mr. Bress. I think that that exception is not well worth while on appeal unless there is proper offer of proof.

The Court. All right.

Mr. Bress. I propose to prove in this connection that the competitors of this witness, of this partnership, engage in the same type of business, but without operating on their own capital, and engage in a substantial consignment
17 business as distinguished from this partnership's engagement in an outright purchase and sale business. By virtue of that, those persons have a net income equal to or in excess of this partnership for the calendar year 1936, and they are called upon, by the terms of this act, to pay a tax of two fifths of one percent only on that differential, the difference between the selling price and the consigned price, whereas this partnership is called upon to pay the tax upon the gross sales prices, which amounts sometimes and in some instances to from ten to twenty times as much tax."

In response to a question as to whether or not the plaintiffs had received any notice from the District of Columbia or from any of its officials during the year 1936 advising them that they would be called upon during the year 1937 or 1938 to pay a tax on the basis of the volume of business done in 1936, the witness answered the question in the negative. Thereupon the following occurred:

"By Mr. Bress:

Q. What, if any, difference would it have made in the manner and style of the operation of your business during the year 1936 had you known that for that period you would be subsequently called upon to pay a tax on the gross volume of sales?

Mr. Morgan. I object to that.

The Court. I will sustain the objection.

Mr. Bress. Your Honor will allow us an exception?

The Court. Granted.

Mr. Bress: The offer of proof is that, in support of the allegation of the retroactive character of the tax, that during the year 1936 this partnership, had it had any knowledge or reason to believe that in August, 1937, a law would be passed calling upon them to pay a tax for the privilege of doing business business from August, 1937, through

June, 1938, on the basis of gross sales made, would
18 not have engaged in a substantial volume of the sales which it did make at no profit or at a very small profit, if they had had reason to believe that they would subsequently be called upon to pay a tax on the basis of that gross volume. Had they so known they would not have purchased for the purpose of selling at one half or one percent profit; they would have purchased only for the purpose of selling on the basis where they could avoid a tax and would have exercised their business judgment on the consignment basis and not on the outright purchase and sale."

Thereupon plaintiffs' license to do business issued pursuant to the terms of the Business Privilege Tax sections of the District of Columbia Revenue Act of 1937, approved August 17, 1937, was admitted in evidence.

On cross examination the witness testified, as follows:

The commission business done by the firm during the year 1936, as distinguished from the outright purchase and sale business, amounted to only \$16,000 of the total of gross receipts, and produced a commission of approximately \$2,000, and on that item witness returned and paid the tax on the commission.

With the exception of that part of the sales of goods that are diverted before reaching the District of Columbia, all other goods purchased by plaintiffs come into the District of Columbia and plaintiffs own the goods before they are resold by plaintiffs, except that part which comes to them on consignment. Asked if plaintiffs sold their goods at what point in the District of Columbia, witness replied that they sell from their office and through salesmen to the market stores; the \$73,000 of gross sales sold out of the District of Columbia are sold by plaintiffs' salesmen in Virginia from Falls Church to Alexandria; these salesmen take orders which are turned into the office and the goods are de-

livered by plaintiffs to the purchasers in Virginia on the next day after order; plaintiffs do not confirm the
19 orders; the salesmen, who are plaintiffs agents, have authority to bind the plaintiffs in Virginia; after the agent comes back with the orders plaintiffs ship the goods out of the District of Columbia to the purchasers in Virginia; the money for the purchases is paid on delivery in Virginia when the goods are delivered; they are never paid for in advance but in a few cases are paid for on the day after delivery, in Virginia.

Thereupon plaintiffs rested and counsel for the defendant moved the court for a finding or judgment for the defendant and argued the same and thereafter counsel for the plaintiffs likewise replied thereto and moved for judgment for the plaintiffs in the amount of the tax paid plus the penalty and interest, since defendant elected to stand on the plaintiffs' case and offered no evidence in its own behalf.

During the course of said argument counsel for plaintiffs argued amongst other propositions each of the points mentioned in their Motion for New Trial and upon the conclusion of said argument, counsel for the respective parties filed briefs with the court. Thereafter, on April 22, 1938 the court, entered its finding for the defendant, pursuant to notice that such finding would be made and plaintiffs filed their exception thereto. On April 22, 1938 plaintiffs filed a Motion for New Trial which was overruled, and an exception allowed on each of the grounds stated in the Motion, on April 29, 1938, and judgment entered for defendant.

The foregoing is the substance of all of the testimony bearing upon the exceptions herein reserved on behalf of the plaintiffs.

And thereupon, as all of said exceptions were duly noted and allowed, as aforesaid, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which
20 is hereby ordered, so that plaintiffs may have their case reviewed by the United States Court of Appeals for the District of Columbia, in accordance with the Writ of Error issued out of said court on the 27th day of May 1937, the plaintiffs, by their attorneys, move the court to sign and seal this, their Bill of Exceptions, to have the same force and effect as if each and everyone

of said exceptions had been separately signed and sealed, which motion is granted by the court; and thereupon the plaintiffs tender this, their Bill of Exceptions, and pray that the court sign and seal the same, which is accordingly done, now for them, this 30th day of June, 1938.

ELLEN K. RAEDY

*Judge, Municipal Court of the
District of Columbia*

Approved:

ALVIN L. NEWMYER

DAVID G. BRESS

Attorneys for Plaintiffs

ELWOOD H. SEAL (Ct. S.)

GLENN SIMMON

Attorneys for Defendant

Proof of Service

Service of a copy of the foregoing Bill of Exceptions with Notice of Submission acknowledged this 15th day of June 1938.

ELWOOD H. SEAL (Ct. S.)

GLENN SIMMON

Attorneys for Defendant

21

Designation of Record

Filed June 1, 1938

The Clerk of the Municipal Court of the District of Columbia, will please prepare the record for the United States Court of Appeals for the District of Columbia on writ of error in the above-entitled cause granted therein on May 27, 1938 by the said United States Court of Appeals for the District of Columbia in original number 2899, and include in the record so prepared, the following:

1. Particulars of Demand filed January 14, 1938.
2. Further bill of particulars filed March 1, 1938
3. Memorandum: Trial held in open court before Judge Raedy March 9, 1938 and cause submitted upon conclusion of testimony.
4. Memorandum: Verdict or finding by the court for the defendant.

5. Notation of Exceptions by plaintiff filed April 21, 1938.
6. Motion for new trial, filed April 22, 1938.
7. Memorandum: Motion for new trial overruled and judgment for defendant on April 29, 1938 and exceptions noted thereto by plaintiff.
8. Judgment for defendant with exceptions noted thereto.
9. Bill of exceptions.
10. This designation

(Signed) ALVIN L. NEWMYER

(Signed) DAVID G. BRESS

Attorneys for Plaintiff

(Plaintiff in error in United States Court of Appeals for the District of Columbia)

Service of a copy of the foregoing Designation of Record acknowledged this 31st day of May, 1938.

(S) ELWOOD H. SEAL (Ct. S)
Corporation Counsel, D. C.

(S) GLENN SIMMON
Asst Corporation Counsel.

22

Assignment of Errors.

Filed June 9, 1938

The plaintiffs assign as error committed by the trial court the following:

The Court erred in:

1. Entering a finding, verdict and judgment for the defendant.
2. Denying plaintiff's motion for judgment.
3. Refusing to hold that Title 6 of the District of Columbia Revenue Act of 1937 imposed an undue burden on interstate commerce and that plaintiffs' business was in interstate commerce, unduly burdened by said Act.
4. Refusing to hold that the said Act is unconstitutional as a burden on interstate commerce and that the Congress in legislating locally for the District of Columbia acts as a state legislature with like limitations to such legislation.

5. Refusing to hold that the said Act is retroactive, arbitrary and confiscatory and therefore invalid on said grounds.

6. Refusing to hold that said Act is discriminatory as applied to persons engaged in the same business and otherwise similarly situated and in excluding evidence sought to be adduced in this connection.

7. Excluding evidence sought to be adduced as to the competitive activities of others engaged in the same kind of business and the manner in which such business is operated.

8. Refusing to hold that the Business Privilege Tax provisions of said Act are unconstitutional and void as applied to the plaintiffs.

9. Denying plaintiffs Motion for New Trial.

10. Other respects apparent of record.

23

(S) ALVIN L. NEWMYER

(S) DAVID G. BRESS

Attorneys for Plaintiffs.

Service of a copy of this Assignment of Errors acknowledged this 9th day of June, 1938.

(S) ELWOOD H. SEAL (Ct. S)

Corporation Counsel, D. C.

24

Additional Designation of Record

Filed June 9, 1938

In addition to those items included in the Designation of Record on Writ of Error heretofore filed in this cause, the clerk will also include the following:

11. Assignment of Errors.

12. This Designation

(S) ALVIN L. NEWMYER

(S) DAVID G. BRESS

Attorneys for Plaintiffs

Service of a copy of the foregoing Additional Designation of record acknowledged this 9th day of June 1938.

(S) ELWOOD H. SEAL (Ct. S)

Corporation Counsel, D. C.

25 Endorsed: Filed May 26 1938 Municipal Court
District of Columbia

United States of America, ss:

The President of the United States,

To the Honorable Ellen K. Raedy, Judge of the Municipal Court of the District of Columbia,

Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between William H. Neild and J. Emerson Sauerhoff, co-partners, doing business under the name and style of Neild and Sauerhoff, plaintiffs, and District of Columbia, a municipal corporation, defendant, No. 362,700 a manifest error hath happened, to the great damage of the said plaintiffs as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable D. Lawrence Groner, Chief Justice of the said Court of Appeals, the 27th day of May, in the year of our Lord one thousand nine hundred and thirty eight.

JOSEPH W. STEWART

(Seal)

*Clerk of the United States
Court of Appeals for the Dis-
trict of Columbia.*

Allowed by

D. LAWRENCE GRONER

*Chief Justice of the United States Court of Appeals
for the District of Columbia.*

Endorsed on back: Filed May 27 1938 Municipal Court
District of Columbia

26 Municipal Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 26, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. 362,700, wherein William H. Neild and J. Emerson Sauerhoff, co-partners, etc., are the plaintiffs and District of Columbia, a municipal corporation, is defendant, as the same that remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 16th day of July, 1938.

BLANCHE NEFF

(Seal)

Clerk.

Endorsed on Cover: No. 7213. William H. Neild et al., Plaintiffs in Error, vs. District of Columbia, a Municipal Corporation. United States Court of Appeals for the District of Columbia Filed Jul 16 1938 Joseph W. Stewart, Clerk

FILED SEP 21 1938

Joseph W. Stewart
CLERK

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1938.

—
No. 7213.
—

WILLIAM H. NEILD and J. EMERSON SAUERHOFF, co-
partners, doing business under the name and style
of NEILD & SAUERHOFF, *Plaintiffs in Error*,

v.

DISTRICT OF COLUMBIA, a Municipal Corporation,
Defendant in Error.

—
BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.
—

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Plaintiffs in Error.

R. G. LAMENDORF,
Of Counsel.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1938.

No. 7213.

WILLIAM H. NEILD and J. EMERSON SAUERHOFF, co-
partners, doing business under the name and style
of NEILD & SAUERHOFF, *Plaintiffs in Error*,

v.

DISTRICT OF COLUMBIA, a Municipal Corporation,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This case arises on Writ of Error to the Municipal Court of the District of Columbia to review a judgment for the defendant in error, defendant below, in an action brought by the plaintiffs in error, plaintiffs below, to

recover the sum of \$245.92 paid by the plaintiffs under protest to the defendant as a tax for the privilege of engaging in business in the District of Columbia.

The tax was levied by virtue of an assessment in said amount imposed upon said plaintiffs under the "Business Privilege Tax Act" for the District of Columbia (Title 6 of the District of Columbia Revenue Act of 1937, approved August 17, 1937, 50 Stat. 690, Public No. 314, 75th Congress, Ch. 690, First Session, H. R. 7472). The suit filed on behalf of the plaintiffs below, charging the invalidity of the tax and claiming its recovery, was predicated on the ground that the taxing statute under which the assessment and payment were made was unconstitutional, insofar as it was applied to the plaintiffs.

In the Particulars of Demand filed by the plaintiffs (R. 1) they charged that the defendant, pursuant to the said District of Columbia Revenue Act of 1937, imposed an assessment of tax against the plaintiffs for the privilege of doing business for a period less than one year, from 60 days after August 17, 1937, to June 30, 1938, based on a percentage of the gross volume of receipts received by the plaintiffs in their business during the calendar year 1936. In order to obtain a license to remain in business, plaintiffs were required to file a return and in order to retain the license plaintiffs were required to pay the tax, which was paid under protest as more particularly hereinafter appears. (R. 12, 13)

Plaintiffs charged that they were engaged in business as a partnership dealing in the wholesale distribution of perishable fruit and produce (R. 3); that their business was such that they were engaged in interstate commerce (R. 3); that because of that nature of the business, plaintiffs were duly licensed to engage in that

business by the United States Department of Agriculture, pursuant to the provisions of the Perishable Agricultural Commodities Act (46 Stat. 538, June 10, 1930, c. 436, Sec. 18) (R. 4); that of the gross receipts received during the calendar year 1936 upon which the tax was imposed, more than half of the receipts arose out of interstate sales, and more than \$3,000 of sales arose from the transfer or sale of goods bought at points out of the District of Columbia and sold to points out of the District of Columbia which goods never physically came into the District of Columbia (R. 4); that during the calendar year 1936, without the withdrawal of any partnership salaries, the net income of the business amounted to three and seven-tenths per cent of gross receipts (R. 4); and, that plaintiffs did not know during the calendar year 1936 that a tax would be imposed upon them in 1937 for the privilege of doing business during that year based on gross receipts for 1936, for had they been so advised they would not have entered into the volume of sales which they did during that year on a small margin of profit (R. 4, offer of proof). It was further charged that after plaintiffs filed their return they failed to pay the tax and penalties accumulated thereon. The defendant notified the plaintiffs on December 29, 1937, to appear before the Assessor of the District of Columbia on January 3, 1938, to show cause why their license to do business should not be revoked for non-payment of the tax. (R. 2.) Appearance was duly made and, after hearing, the license was ordered revoked on the following day unless payment of the first half of the tax with accumulated penalty was paid on the following day. Payment was accordingly made, within the time allowed, under protest, in the sum of \$245.98, representing \$241.10 for

the first half of the tax and \$4.82 representing a 2 per cent penalty for non-payment. (R. 2.)

At the trial it appeared, in the return made by the plaintiffs, that during the calendar year 1936 the gross receipts received by the plaintiffs in their business as wholesale fruit and produce distributors amounted to \$141,723.70. The statutory exemption of \$2,000 was allowed and the tax imposed by the defendant amounted to $\frac{2}{5}$ of 1 per cent of the difference between the gross receipts and the exemption, with an allowance for tangible property tax paid, resulting in an imposition of tax amounting to \$569.78, and demand was made by the defendant of the plaintiffs for payment of one-half of said amount which amounted to \$241.10, after said allowable deductions, which amount was paid, as aforesaid. The demand letter and protest letter are set forth in the record. (R. 11, 12.) (The second half of the said tax was likewise paid subsequently, under protest, and no action has yet been instituted to recover the same, pending the outcome of this case.)

The evidence established the character of the plaintiffs' business as wholesale fruit and produce dealers engaged in interstate commerce and holding all licenses required by law, including the aforementioned license issued by the Department of Agriculture under the Perishable Agricultural Commodities Act to engage in interstate commerce. (R. 10-16.) Of gross receipts amounting to \$141,723.70, \$77,044 of such receipts were received from sales to firms out of the District of Columbia in interstate transactions and \$64,679 to firms in the District of Columbia. (R. 11.) Of the item of \$77,044, \$3,044.55 represented sales of goods which never reached the District of Columbia. (R. 11.)

The amounts shown by the testimony were taken

from the original books of entry of the partnership, which had theretofore been inspected by the defendant's representatives. (R. 13.) Without any allowance for partners' salaries or withdrawals, the firm's net earnings for the calendar year 1936 represented 3.7 per cent of gross receipts. (R. 13.) It was further shown that only \$16,000 of the total of gross receipts was on commission basis and the plaintiffs made such return therefor and paid the tax on that part, on the commission only. (R. 15.) The business done by the plaintiffs out of the District of Columbia, representing the item of \$77,044, resulted from sales made by salesmen in Virginia who took orders in Virginia which were turned into the office of the firm in the District of Columbia and the goods delivered from the District of Columbia to the point of location of the purchasers in Virginia. (R. 15, 16.) Such orders were not confirmed by the plaintiffs in the District of Columbia. The plaintiffs' representatives in Virginia "who are plaintiffs' agents, have authority to bind the plaintiffs in Virginia; after the agent comes back with the orders plaintiffs ship the goods out of the District of Columbia to the purchasers in Virginia; the money for the purchases is paid on delivery in Virginia when the goods are delivered." (R. 16.) The interstate character of plaintiffs' business was not questioned below and the case was proceeded with on the tacit assumption that the business, as aforesaid, was interstate in character.

Two questions of evidence arose during the trial (R. 13, 14, 15):

1. Counsel for plaintiffs, on direct examination of one of the plaintiffs, was asked whether the competitors of the firm dealt on a consignment basis as dis-

tinguished from plaintiffs' dealings on an outright purchase and sale basis. (R. 13.) Objection was duly made and sustained and an exception allowed and plaintiffs offered to prove in substance, with respect to the alleged discriminatory character of the tax, that such competitive persons engaged in the same business are required to pay a tax only on gross commissions earned and not on gross sales, and that such difference in burden frequently amounts to 10 to 20 times as much tax. (R. 14.)

2. Asked what difference it would have made in the manner and style of the operation of the business of the firm, had they known in 1936 that they would be called upon subsequently to pay a tax on the basis of the gross volume of sales in 1936, objection was interposed by defendant and sustained by the court and an exception allowed. (R. 14.) Offer of proof was made to the effect that had such knowledge existed during the year 1936 or if there had been reason to believe that a taxing statute would be enacted in August 1937, the amount of which tax would be based on the form and volume of sales during the calendar year 1936, the plaintiffs would not have engaged in outright purchase and sale on a small profit margin but would have accomplished the same volume of business on a consignment basis, with a consequent avoidance of a substantial part of the tax. (R. 15.)

At the conclusion of plaintiffs' case defendant moved for a finding in its favor and did not offer any evidence for and on its behalf and elected to stand on the plaintiffs' case.

The trial was held before Judge Raedy on March 9, 1938. (R. 5.) On April 22, 1938, the court found in favor of the defendant to which finding plaintiffs noted

exceptions which were duly allowed by the court. (R. 5.) No opinion was delivered by the court. Motion for New Trial was duly filed (R. 6) and overruled and judgment entered for the defendant, to which plaintiffs noted exceptions. (R. 7.) A Petition for Writ of Error to the Municipal Court of the District of Columbia to review the said judgment was duly filed and allowed by this court on May 27, 1938. (R. 20, 21.)

ASSIGNMENT OF ERRORS.

The Court erred in (R. 18, 19):

1. Entering a finding, verdict and judgment for the defendant.

2. Denying plaintiffs' motion for judgment.

3. Refusing to hold that Title 6 of the District of Columbia Revenue Act of 1937 imposed an undue burden on interstate commerce and that plaintiffs' business was in interstate commerce, unduly burdened by said Act.

4. Refusing to hold that the said Act is unconstitutional as a burden on interstate commerce and that the Congress in legislating locally for the District of Columbia acts as a state legislature with like limitations to such legislation.

5. Refusing to hold that the said Act is retroactive, arbitrary and confiscatory and therefore invalid on said grounds.

6. Refusing to hold that said Act is discriminatory as applied to persons engaged in the same business and otherwise similarly situated and in excluding evidence sought to be adduced in this connection.

7. Excluding evidence sought to be adduced as to the competitive activities of others engaged in the same kind of business and the manner in which such business is operated.

8. Refusing to hold that the Business Privilege Tax provisions of said Act are unconstitutional and void as applied to the plaintiffs.

9. Denying plaintiffs' Motion for New Trial.

10. Other respects apparent of record.

PRELIMINARY ANALYSIS.

Since no opinion was delivered, either oral or written, by the court below, it is difficult to determine the exact grounds upon which the court below based its entry of judgment for the defendant. However, in view of the extended arguments and briefs filed, there were presented to the court several well defined propositions urged at the trial and in the motion for new trial. The court below must necessarily have predicated its decision upon these propositions.

Plaintiffs contended that the taxing act is unconstitutional since it imposes an undue burden on interstate commerce, in which commerce plaintiffs are engaged. There was no dispute below as to the interstate character of the substantial portion of plaintiff's business yet, it was argued by the defendant, that even if the act does impose a burden on that commerce, as the evidence tended to indicate, then the taxing act is still constitutional, for the reason that, since the same was enacted by the Congress of the United States, that body has the power to burden interstate commerce whereas the legislature of a state does not have the power to do so. In this connection, therefore, it is the position of the plaintiffs that the Congress of the United States, in legislating for the District of Columbia, acts as the legislature of a state, subject to the same limitations of the commerce clause of the Constitution of the United States as are the legislative bodies of the several states. Therefore, with respect to the first point raised by the plaintiffs, that the act constitutes a burden on interstate commerce, if this court should hold that the constitutional limitation of the commerce clause does not apply to Congress when legislating for the District of Columbia, then the fact of the burden imposed by the

Act on interstate commerce would not be in violation of the constitution. If Congress does not have the power to burden interstate commerce when legislating for the District of Columbia, as plaintiffs contend, plaintiffs claim that the operation of the taxing Act as to them amounts to a direct burden on that commerce.

Apart from the interstate commerce feature, plaintiffs maintain that the taxing Act is an unconstitutional violation of the Fifth Amendment because it is retroactive in character, in that it imposes a tax for the privilege of doing business from 60 days after August 17, 1937 to June 30, 1938, using as a basis for determining the amount of the tax, gross receipts received during the calendar year 1936, which was entirely completed and past before the Act was either proposed or approved. In this connection, plaintiffs contend that even though partial retroactivity in a taxing Act may not render the same unconstitutional, complete retroactivity is objectionable on constitutional grounds. Plaintiffs further challenge the validity of the taxing Act on the ground that the same is arbitrary and discriminatory as it is applied to the plaintiffs and others engaged in the same type of business.

ARGUMENT.**I.**

Title VI of the District of Columbia Revenue Act of 1937, as applied to the plaintiffs, is unconstitutional as constituting a burden on interstate commerce.

A.

Local legislation for the District of Columbia by the Congress is subject to the limitations of the commerce clause of the Constitution of the United States in the same manner as is the legislature of a state.

The power of Congress to regulate interstate commerce is clear and precise. The exercise of that power is distinguishable from the exercise of its power to regulate domestic commerce in the District of Columbia.

El Paso & N. W. Ry. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106.

McNamara v. Wash. Term. Co., 35 App. D. C. 230.

All legislation enacted by Congress is divisible into two categories: (1) legislation applicable to the United States as a whole; and, (2) legislation applicable only to the District of Columbia. There is no question raised here as to the power of Congress to tax the people of the District of Columbia. It is conceded that Congress has that power to the same extent as does the legislature of a state. Although Congress may pass legislation which amounts to a burden on interstate commerce, such legislation is not objectionable if it is applicable to all commerce of that character throughout the nation. However, when Congress

enacts legislation which burdens interstate commerce and is not applicable to the nation as a whole but applies solely to the municipality of the District of Columbia, then it goes beyond its power in acting for the District of Columbia and imposes an undue burden on a locality which it does not have the power to burden separately from the rest of the nation. When legislation is enacted which results in a burden on interstate commerce it is not objectionable when that burden is generally applicable to the whole of the nation. Where legislation creates a burden on interstate commerce which is imposed upon the people of a particular jurisdiction, municipal or state, then the objection to such legislation is not the fact that it imposes a burden, but the fact that the burden is not applicable to the whole nation and because it is limited to a particular locality.

In legislating for the District of Columbia, Congress acts as the legislature of a state.

Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98.

Gibbons v. D. C., 116 U. S. 404, 29 L. ed. 680.

Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637.

Potomac Electric Power Co. v. Hazen, 67 App. D. C. 161.

Hirsh v. Block, 50 App. D. C. 56.

Beitzell v. D. C., 21 App. D. C. 49.

In *Gibbons v. District of Columbia*, *supra*, referring to the *Loughborough* case, *supra*, the court said:

“The point there decided was that an Act of Congress, laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution, might comprehend the District of Columbia; and the power of

Congress, legislating as a local Legislature for the District, to levy taxes for district purposes only, in like manner as the Legislature of a State may tax the people of a State for state purposes, was expressly admitted, and has never since been doubted.....*Mattingly v. D. C.*, 97 U. S. 541, 687, 24 L. ed. 1112. In this exercise of this power, Congress like any State Legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In *Downes v. Bidwell*, 182 U. S. 244, 260, 261, 45 L. ed. 1088, the court said:

"This District has been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution."

No case has expressly passed upon the question here raised as to whether or not Congress, when enacting local legislation for the District of Columbia, is bound by the constitutional limitation of the commerce clause as is a state legislature. Several cases have indicated by dicta that when Congress legislates for the District of Columbia it sits as the legislature of any state subject to the same limitations of the Constitution. No dictum in any case has refuted this proposition.

In *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, the Supreme Court of the United States assumed that commerce between the District of Columbia and the states came within the commerce clause of the Constitution. In that case the Legislative Assembly of the District of Columbia, by authority of Congress, required all agents engaged in the sale of liquor in the District of Columbia to obtain licenses. Hennick, a commercial agent for a Baltimore company, failed to obtain such a license and was convicted for the violation thereof. The court said:

“Congress has express power ‘to exercise exclusive legislation in all cases whatsoever’ over the District of Columbia, thus possessing the combined powers of a general and of a State Government in all cases where legislation is possible.....

It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia, because whenever Congress acts upon the subject the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point.

In our judgment Congress for the reasons given could not have delegated the power to enact the third clause of the 21st section of the Act of As-

sembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, and although by several Acts, Congress repealed or modified parts of this particular by-law, these parts were separably operative, and such as were within the scope of municipal action, so that this congressional legislation cannot be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not originally have been authorized."

Notwithstanding the fact that the Act held unconstitutional in the Stoutenburgh case was one passed by the Legislative Assembly of the District of Columbia, the last sentence of the above quoted portion of the opinion in that case indicates that even if that legislation had been passed by Congress it would have been equally invalid.

The decision in the Stoutenburgh case was followed by the Court of Appeals in the case of *Beitzell v. District of Columbia*, 21 App. D. C. 49, where a similar tax was involved, requiring beer salesmen to obtain licenses in the District of Columbia. Beitzell was convicted in the Police Court for soliciting business as a brewer's agent for a non-resident company in the District of Columbia, without first having obtained a license. In construing the statute so as to determine whether or not Congress intended it to apply to agents representing the owners of property and business outside of the District, for the privilege of soliciting orders within it, the court said:

"Doubtless the Congress that passed the act in question was aware of the decisions of the Su-

preme Court of the United States made in the cases of *Robbins v. Shelby Taxing District*, 120 U. S. 489, *Stoutenburgh v. Hennick*, 129 U. S. 141, and the very recent case of *Stockard v. Morgan*, 185 U. S. 27; and to declare that it was the intention of Congress, by the provisions of the act under consideration, that it should be lawful for the authorities of this District to impose a license tax upon soliciting agents of nonresident merchants of orders from persons resident in the District, to be filled and supplied to such resident persons, would be in utter disregard of the principle decided by those and many other cases. It is unnecessary to hold in this case that this District can be rightfully treated as a State within the meaning of the Constitution, in considering the question of the power of Congress to regulate commerce as between this District and the several States of the Union. But in considering the effect of the act in question, it is not fair to presume, in the absence of an express declaration to that effect, that Congress intended to disregard the settled principle of commercial intercourse of the country, which, as embodied in the Constitution of the country, prohibits a State from imposing a license tax upon persons representing the owners of property outside of the State, for the privilege of soliciting orders within it, as agents of such owners, for property to be shipped to persons within the State. *Stockard v. Morgan*, *supra*. That principle, we think, was not intended to be violated by the provisions of the statute here involved."

Hyde v. Southern Ry. Co., 31 App. D. C. 466.
McNamara v. Washington Terminal Co., 35 App. D. C. 230.

American Security & Trust Co. v. Rudolph, 38 App. D. C. 32.

Wood v. United States, 65 App. D. C. 330.

In *Potomac Electric Power Company v. Hazen*, 67 App. D. C. 161, this court had before it a tax on corporate gross earnings derived by an electric company based on the gross earnings of that company, which company had part of its line in the District of Columbia and part in the State of Maryland. The validity of the tax was upheld not as a tax on gross earnings but as a franchise tax measured by gross earnings. The District of Columbia in that case conceded that a tax on gross earnings by the District of Columbia on local companies deriving gross earnings from the District of Columbia and interstate commerce would constitute a burden on interstate commerce and this concession was accepted in the opinion of the court:

“The appellees insist that the tax is a franchise tax, measured by gross earnings, and not a tax upon gross earnings. They concede, as of course they must, that a tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause.”

The concession is cited in this particular as sustaining the proposition that local legislation for the District of Columbia which results in a burden on interstate commerce is a violation of the commerce clause of the Constitution. That concession, adopted by the court, assumed the character of Congress legislating as a State Assembly for the District of Columbia and that in that capacity it is subject to the limitations of the commerce clause.

In *O'Donoghue v. U. S.*, 289 U. S. 516, 539, 77 L. Ed. 1356, 1365, the following was said:

“Over this District Congress possesses ‘the combined power of a general and of a State Gov-

ernment in all cases where legislation is possible.' *Stoutenburgh v. Hennick*, 129 U. S. 141, 147. The power conferred by Article 1, section 8, clause 17, is plenary; but it does not include, in respect of the District, the exercise by Congress of other appropriate powers conferred upon that body by the Constitution or authorize a denial to the inhabitants of any Constitutional guarantee not plainly inapplicable."

It has also been held that the Fifth Amendment to the Federal Constitution is applicable in the District of Columbia (*Sims v. Rives*, and *Barry v. Hall*, *infra*). The significance of this proposition in this connection is that it lends support to the conclusion that the municipality of the District of Columbia is subject to the same benefits and immunities in federal legislation as are the several states of the Union.

In an opinion by Mr. Justice Bailey in the District Court of the United States for the District of Columbia in the case of *District Grocery Stores v. District of Columbia*, decided on July 21, 1938, the following was said:

"There may be some question whether the District of Columbia is a state within the meaning of the provision of the Constitution giving Congress the power to regulate commerce between the states, but in the case of *Stoutenburgh v. Hennick*, 129 U. S. 141, the Supreme Court apparently assumed that commerce between the District of Columbia and one of the states came within that provision of the Constitution. That the question was raised is shown by the dissenting opinion of Justice Miller who dissented on the ground that such commerce was not commerce 'among the several states.'

The defendant claims that the tax in question is not a tax upon interstate commerce, but is an excise tax measured by the amount of the business, relying upon *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, and *Potomac Electric Power Co. v. Hazen*, 67 App. D. C. 161, but the former case has been definitely overruled on this point by the later case of *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203. I think that under this case the tax in question, so far as it may be levied upon gross receipts derived from interstate commerce, is a burden upon that commerce.

The defendant contends that the decisions of the Supreme Court to the effect that a state may not lay a burden upon interstate commerce, are based upon the ground that by the Constitution the control of such commerce is vested in Congress alone, and that these cases have no application to a case where Congress itself is laying the burden. This question has apparently not yet been passed upon directly by the courts. In *Beitzell v. District of Columbia*, 21 App. D. C. 49, the Court of Appeals held that it was not the intention of Congress to levy such a tax. In *Stoutenburgh v. Hennick*, above cited, it was held that the Legislative Assembly of the District had no such power and that Congress could not delegate such power, and that there was nothing in the record to justify the assumption that it endeavored to do so. In deciding that case, after citing cases holding that the states had no power to burden Interstate Commerce, the Court went on and said:

‘The business referred to is thus definitively assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. * * * It falls, therefore, within the domain of the great,

distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality.'

The court however declined to pass upon the question whether Congress had the power to itself pass such a law.

In *Potomac Electric Power Company v. Hazen*, above cited, referring to a tax for the support of the District government measured by the gross earnings of a District of Columbia corporation, the Court of Appeals said:

'The appellees insist that the tax is a franchise tax, measured by gross earnings, and not a tax upon gross earnings. They concede, as of course they must, that a tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause.'

It is well settled that Congress has all the powers of taxation over the District of Columbia that a state would have. It is also settled that these powers are subject to the limitations of the Constitution, *Downes v. Bidwell*, 182 U. S. 244. The question here is whether Congress has greater powers of taxation than a state would have.

I cannot conceive that the grant of power to Congress to regulate commerce between the states was intended to include the power to burden it for a particular community, but that, as was said in *Stoutenburgh v. Hennick*, 'The business referred to is thus definitively assigned to that class of cases which calls for uniform rules and national legislation'. As was said in *Texas & New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, at page 570, 'The power to regulate Commerce is the power to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10

Wall, 557, 564); to adopt measures "to promote its growth and insure its safety" (County of Mobile v. Kimball, 102 U. S. 691); to foster, protect, control and restrain.'

The tax in question is clearly not for any purpose such as these, but is solely for the benefit of the District of Columbia. The burden of this tax will fall indirectly at least upon those who live in the states and carry on commerce with those doing business here, as well as directly upon the latter.

Upon the whole and especially in view of the language of the Court of Appeals above cited, I am of the opinion that Congress had no power to lay this burden upon interstate commerce."

In the case of *Maryland & Virginia Milk Products Assn. v. Hazen*, 66 App. D. C. 136, suit was filed to enjoin the collection by the District of Columbia of the intangible property tax provided for by an Act of Congress. In opposition to the suit for injunction the Commissioners of the District of Columbia contended that the court did not have the power to entertain such a suit by reason of Sec. 3224, R. S. (26 U.S.C.A. Sec. 1543) which provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The court refused to accept this argument on the ground that this section of the U. S. Code was intended to apply only to suits to restrain the assessment and collection of taxes levied by the United States. *Alexandria Canal R. & Bridge Co. v. D. C.*, 1 Mackey 217, 234; *Craighill v. Van Riswick*, 8 App. D. C. 185, 206, 207. This section, therefore, was held not applicable to the case, since the tax therein involved was not assessed by the Internal Revenue Officers of the United States, but by municipal authorities, in order to defray the expenses of the Dis-

trict of Columbia, and would not, as such, become part of the general revenues of the United States even though the statute under which the tax was levied was enacted by Congress.

In *Cincinnati Soap Company v. U. S.*, 301 U. S. 308, 317, 81 L. ed. 1122, in discussing the character of legislation by Congress concerning Territories of the United States, the court, used language applicable to the status of the District of Columbia, citing the *Stoutenburgh* case, as follows:

“A dependency has no government but that of the United States, except insofar as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible. Compare *Stoutenburgh v. Hemmick*, 129 U. S. 141, 147, 32 L. ed. 637, 638; *First National Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. ed. 1046, 1047; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 42, 34 L. ed. 478, 490; *Utter v. Franklin*, 172 U. S. 416, 423, 43 L. ed. 498, 500. To say that the federal government, with such practically unlimited powers of legislation in respect of a dependency, is yet powerless to appropriate money for its needs, is to deny—what the foregoing considerations forbid us to deny—that the United States has, in that regard, the equivalent power of a state in comparable circumstances.”

It is submitted that the foregoing authorities establish that Congress, in legislating purely local laws applicable to the District of Columbia for revenue purposes or regulatory purposes, acts in the same capac-

ity as the legislature of a state and, acting in that capacity, is subject to the same limitations of the commerce clause as is the legislature of a state. The power of Congress to burden interstate commerce, which power it alone has, endows it with that power in any of its legislation which is designed to apply to the nation as a whole. However, the power which Congress has, to burden interstate commerce, is lost and it is without that power, to the same extent that the legislature of a state is without that power, when it enacts legislation for the District of Columbia in its capacity as a "local or a state government" as is Title VI of the District of Columbia Revenue Act of 1937, and does not act in its capacity as "the general government."

B.

The Act imposes an unconstitutional burden on interstate commerce in violation of Article 1, Section 8, of the Constitution.

(1) *Plaintiffs are engaged in interstate commerce.*

Plaintiffs are wholesale dealers in fresh fruits and vegetables, perishable in nature, duly licensed to engage in interstate commerce by authority of the United States Department of Agriculture. (R. 10) All of the produce sold by the plaintiffs is purchased by them from shippers located outside of the District of Columbia. (R. 10, 11) Such produce is disposed of by the plaintiffs in several ways (R. 11): part of the produce is sold to dealers in the District of Columbia; part of the produce is sold to dealers outside of the District of Columbia; part of the produce is obtained by the plaintiffs on consignment and disposed of either within

or without the District of Columbia; and, part is sold by the plaintiffs to persons outside of the District of Columbia, such produce never physically reaching the limits of the District of Columbia (R. 11). More than 50 per cent of gross receipts for the year 1936 arose out of transactions of sale to firms outside of the District of Columbia (R. 11, 15, 16). The following appears in the record tending to establish that the transactions involving sales by plaintiffs to firms outside of the District of Columbia are entirely consummated in the State of Virginia.

“the \$73,000 of gross sales sold out of the District of Columbia are sold by plaintiffs’ salesmen in Virginia from Falls Church to Alexandria; these salesmen take orders which are turned into the office and the goods are delivered by plaintiffs to the purchasers in Virginia on the next day after order; plaintiffs do not confirm the orders; the salesmen, who are plaintiffs’ agents, have authority to bind the plaintiffs in Virginia; after the agent comes back with the order plaintiffs ship the goods out of the District of Columbia to the purchasers in Virginia; the money for the purchases is paid on delivery in Virginia when the goods are delivered; they are never paid for in advance but in a few cases are paid for on the day after delivery, in Virginia.” (R. 15, 16).

The activities of the plaintiffs in sales out of the District of Columbia are accomplished by agents authorized to bind the plaintiffs in Virginia. The sales are actually consummated in Virginia where the contract is made, the goods delivered, received and paid for. These transactions may be stated to be purchases made by order in a state requiring shipment from the District of Columbia to that state where the transac-

tions are consummated. The District of Columbia is only the intermediate place of temporary location of the goods to be sold. The sale occurs in Virginia contemplating an interstate shipment and is there consummated after such interstate shipment.

The business of selling and shipping goods to persons in other states is interstate commerce.

Dahuke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 66 L. ed. 239.

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565.

Weeks v. U. S., 245 U. S. 618, 62 L. ed. 513.

Lemke v. Farmers Grain Co., 258 U. S. 50, 66 L. ed. 458.

Wagner v. Corington, 251 U. S. 95, 64 L. ed. 157.

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 66 L. ed. 622.

Western Cartridge Co. v. Emmerson, 281 U. S. 511, 74 L. ed. 1004.

Adams Mfg. Co. v. Storen, — U. S. —, 82 L. ed. —, (Adv. Sheets No. 17, p. 870).

In *Adams Mfg. Co. v. Storen*, *supra*, where the taxpayer was engaged in the business of manufacturing road machinery and selling 80 per cent of its products to customers in other states on orders taken subject to home office confirmation, the court said that "Appellant's sales to customers in other states and abroad are interstate and foreign commerce."

(2) *The provisions of the Act constitute a direct burden on interstate commerce.*

(a) *Provisions of District of Columbia Revenue Act of 1937.*

Title VI, Sec. 1 (d) provides:

"The term 'business' shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity in or on privately owned property and in or on property owned by the United States Government in the District of Columbia. . . ."

Title VI, Sec. 1 (e) provides:

"The term 'gross receipts' means the gross receipts received from any business in the District of Columbia, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor, or services or other costs, interest, or discount paid, or any other expenses whatsoever; Provided . . . that in connection with commission merchants, attorneys or other agents, the term 'gross receipts' shall be deemed to mean the gross amount of such commissions or gross fees received by them, . . ."

Title VI, Section 2, provides:

"No person shall engage in or carry on any business in the District of Columbia after 60 days from the approval of this Act and until July 1, 1938, without first having obtained a license so to do from the Commissioners, . . ."

The Commissioners may, after hearing, revoke any license issued hereunder for failure of the licensee to file a return or corrected return within the time required by this title or to pay any installment of tax when due."

Section 5 of said Title provides:

"For the privilege of engaging in business in the District of Columbia, each person so engaged

shall pay to the collector of taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to $\frac{2}{5}$ of one percentum of the gross receipts in excess of \$2,000 derived from such business for the calendar year 1936: Provided, however, That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

Section 5 further provides in substance that if the taxpayer was not engaged in business during an entire year prior to the approval of the Act and the tax is to be measured by his gross receipts for the period during which he was so engaged multiplied by a fraction, the numerator of which shall be 365 and the denominator of which shall be the number of days during which he was so engaged.

Section 6 exempts from the application of the Act those businesses in the District of Columbia which pay taxes under existing laws of the District of Columbia upon gross receipts or upon gross earnings.

TITLE VI is entitled

"TAX ON PRIVILEGE OF DOING BUSINESS".

The name given to the Act by Congress is not binding authority on this court as to the real nature and character of the tax. If the provisions of this act bear upon interstate commerce so directly as to amount to a regulation or a restraint on that commerce in an immediate way it cannot be saved by the name given to it by Congress.

New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U. S. 338, 74 L. ed. 463.

Macallen Co. v. Mass., 279 U. S. 620, 73 L. ed. 874.

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927.

Galveston etc. Ry. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031.

Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785.

Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778.

Further, even if the provisions of this Act are characterized as a "franchise tax" for the privilege of engaging in business, the restraint of the commerce clause would render the same inoperative and void, since the business of the plaintiffs is interstate in character and no "franchise" is involved.

Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623.

Bush & Son Co. v. Maloy, 267 U. S. 317, 69 L. ed. 627.

The tax involved herein is not a tax on income. By its language it applies irrespective of gain or loss. It is neither a tax on the privilege of producing or manufacturing within the rule of *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084. Nor is it a tax in lieu of ad valorem taxes on property within the rule of *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, since all other taxes for licenses and real estate and personal property are continued in force. It is neither a tax for the privilege of domicile alone nor a franchise for any special benefit as was involved in *Potomac Electric Power Co. v. Hazen, supra*.

It can only be classified as a privilege tax for the exercise of the right of earning a livelihood, applicable to individuals as well as to corporations engaged in any "commercial activity". As such tax is based on gross

receipts it is a tax on those receipts condemned by the Supreme Court of the United States in the recent case of *Adams Mfg. Co. v. Storen*, *supra*.

As a tax for the privilege of engaging in interstate business the Act is unconstitutional. The argument that the tax is not on gross receipts but on the privilege must fall. In *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 79 L. ed. 934, in an opinion by Mr. Chief Justice Hughes, holding unconstitutional a Montana occupation or privilege tax on each telephone and on the business of maintaining lines and furnishing telephone service in the state, it was said at page 394:

“There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; *it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it.* And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. . . .

A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid.” (italics supplied)

(b) *As to Burden on Interstate Commerce.*

Whether the tax provided for by the Act is characterized as a franchise tax for the privilege of doing business, as its name would seem to indicate, or as a direct tax on gross receipts, in either event, as applied to the plaintiffs, the same constitutes a burden on in-

terstate commerce and, according to the authorities, is a violation of the commerce clause.

It is true that the provisions of the Act would apply to transactions either intrastate or interstate in character and according to the facts in the case at bar they were applied to the gross receipts of the plaintiffs received from interstate as well as intrastate transactions.

Galveston etc. Ry. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031.

It has been held that an occupation tax on one engaged in both intrastate and interstate commerce in order to be valid, must be imposed solely on account of the intrastate business, in such manner that if such persons were engaged exclusively in interstate business they would not be subject to the tax and that they could discontinue intrastate activities without being subject to any further tax.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, 79 L. ed. 934.

East Ohio Gas Co. v. Ohio, 283 U. S. 465, 75 L. ed. 1171.

Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833.

In *Leloup v. Mobile*, 127 U. S. 640, 645, 32 L. ed. 311, 313, it was said:

“Of course, the exaction of a license tax, as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.”

In *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. ed. 347, 348, the court said:

“Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves.”

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719.

In *Lyng v. Michigan*, 135 U. S. 161, 166, 34 L. ed. 150, 153, it was said:

“We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation of business of carrying on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress.”

It has been consistently held that a tax on gross receipts derived from interstate commerce is invalid as constituting a violation of the commerce clause, whether classified as a privilege tax or other type of excise.

Cook v. Pa., 97 U. S. 566, 23 L. ed. 1015.

Fargo v. Michigan, 121 U. S. 230, 30 L. ed. 888.

Phila. & S. Mail S. S. Co. v. Pa., 122 U. S. 326, 30 L. ed. 1200.

Galveston etc. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031.

Meyer v. Wells, F. Co., 223 U. S. 298, 56 L. ed. 445.

Crew Levick Co. v. Pa., 245 U. S. 292, 62 L. ed. 295.

U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135.

N. J. Bell Tel. Co. v. State Board of Taxes, 280 U. S. 338, 74 L. ed. 463.

Fisher's Blend Station v. Tax Comm., 297 U. S. 650, 80 L. ed. 956.

Puget Sound Stevedoring Co. v. Tax Comm., 302 U. S. 90, 82 L. ed. —, (Adv. Op. No. 3, p. 64).

Western Live Stock v. Bureau of Revenue, 82 L. ed. —, (Adv. Op. No. 11, p. 548).

Adams Mfg. Co. v. Storen, 82 L. ed. —, (decided on May 16, 1938, Adv. Op. No. 17, p. 870).

In *Adams Mfg. Co. v. Storen*, *supra*, decided by the Supreme Court of the United States on May 16, 1938, in an opinion by Mr. Justice Roberts, the question presented involved the validity of the Indiana Gross Income Tax Act of 1933 as construed and applied to interstate commerce. By that Act, gross income was defined to mean gross receipts. The taxpayer was a corporation engaged in the manufacture of road machinery and equipment, maintaining its home office and factory within the state, selling 80 per cent of its products to customers in other states and foreign countries. Shipments were made from the factory to points out of the state pursuant to orders taken subject to approval at the home office within the state. The Supreme Court held that the tax was "a privilege tax upon the receipt of gross income." In holding that such a tax for the privilege of engaging in business, measured by gross receipts, was a burden on interstate commerce, the court said:

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate

commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

The opinion distinguishes the case of *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, where the court upheld a municipal license fee for pursuing the occupation of a manufacturer in St. Louis, based on sales of the previous year. The taxpayer in that case had, during the preceding year, removed certain goods manufactured to a warehouse in another state and upon sale of those goods delivered them from that warehouse to the purchaser and contended that the city was without power to include these sales in the measure of the tax for the ensuing year. The court said that the tax was upon the privilege of manufacturing within the state and it was permissible to measure the tax by the sales price of the goods produced rather than by their value at the date of manufacture. The court in the Adams case said that "If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another state. That the tax in the present case (Adams) is not a tax on the manufacture but a tax on gross sales, is evident from the regulations promulgated pursuant to the act" The court further used the following significant language:

“It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate.”

In *Western Live Stock v. Bureau of Revenue*, decided by the Supreme Court of the United States on February 28, 1938, 82, L. ed. —, (No. 11 Adv. Op., p. 548) a privilege tax was sustained upon the gross receipts of those engaged in certain specified businesses in the State of New Mexico, on the ground that the tax was determined not to be a tax on interstate commerce but an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, similar to the manufacturing tax approved in *American Mfg. Co. v. St. Louis*, 250 U. S. 462, 33 L. ed. 1087, and that its claimed effect on interstate commerce was too remote. However, the court said, concerning gross receipts taxes imposed upon the gross receipts from intrastate and interstate business:

“On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance of being imposed.....with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce..... The multiplication of state taxes measured by the gross receipts

from interstate transactions which spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

This language is particularly appropriate in the case at bar where, according to the undisputed facts sales were made in the State of Virginia, which sales could likewise be taxed by that state in the same manner as the District of Columbia Revenue Act of 1937 proposes to tax such sales in the District of Columbia. Such a result would amount to double taxation on interstate business and would in time spell the destruction of interstate commerce and reestablish the obstacles to free interstate traffic which was the fundamental basis of the commerce clause of the Constitution to remove.

In the case of *Puget Sound Stevedoring Co. v. Tax Comm.*, 302 U. S. 90, 82 L. ed. —, (Adv. Op. No. 3, p. 64) plaintiff was engaged in the general stevedoring business, in the State of Washington. The state levied a tax on the business of the plaintiff measured by a percentage of gross receipts. The character of plaintiff's business tended to show that at times plaintiff contracted to merely supply longshoremen to shipowners for purposes of loading and unloading and at other times supplied, directed and supervised longshoremen in the loading and unloading of cargo. In an opinion by Mr. Justice Cardozo, the court held that the gross receipts tax was valid as to contracts wherein the stevedoring company merely supplied longshoremen, as that was intrastate commerce, but the contracts of the latter type were held to be interstate commerce and as such any privilege tax based on gross receipts from that commerce was held to be in violation of the commerce clause. The court said:

“The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling.”

In *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. ed. 956, an occupation tax measure by the gross receipts from radio broadcasting stations within the state imposed by the State of Washington, which stations broadcasted over an area embracing other states was held to be an unconstitutional burden upon interstate commerce. The court there held that if broadcasting could be taxed, so also could reception, and in that event a cumulative tax burden would be imposed on interstate communications such as might ensue if gross receipts from interstate transportation could be taxed. The discussion in that case well meets the argument which may be presented on behalf of the District of Columbia in the case at bar that the tax provided for by the District of Columbia Revenue Act of 1937 is not a tax on gross receipts but a tax for the privilege of engaging in commercial activities, using gross receipts as a mere measure for determining the amount of tax. An analogous argument was suggested in the *Fisher's Blend* case where the state contended that even though broadcasting may involve interstate commerce the maintenance and operation of a broadcasting station includes intrastate activities which may be subjected to state taxation, in the same manner as a local electricity company was held liable in the case of *Utah Power & Light Co. v. Pfof*, 286 U. S. 165, 76 L. ed. 1038. In distinguishing the *Utah Power & Light*

Company case and in refusing to accept the argument on behalf of the state, the opinion of the court states:

“There the tax was measured by the amount of current generated at the taxpayer’s hydro-electric plant, from which electric power was supplied to consumers in other states. This court held that the operation of generating electrical power, although virtually simultaneous with its transmission, is so distinct and separable from the operation of transmission, in interstate commerce, as to be the appropriate subject of a state tax. The argument now made overlooks the fact that the present tax is not levied upon or measured by appellant’s generation of electro-magnetic waves, but by its gross receipts for the service it performs, which includes both the generation of the energy and its transmission as a means of communication interstate.”

In *New Jersey Bell Company v. State Board of Taxes*, 280 U. S. 338, 74 L. ed. 463, a state statute imposed a license tax purporting to be a franchise tax on the right to use or occupy the public streets or highways based upon such proportion of the gross receipts of the business in the state as the length of the line or main of such taxpayers in the streets bears to the length of the whole line or main and which statute further declares that such license tax shall be in lieu of all other franchise taxes, but did not exempt personal property and real estate from taxation. It was there held that insofar as the tax was based upon the gross receipts from interstate commerce it was repugnant to the commerce clause of the Constitution. In the majority opinion of the court, the following was stated:

“It is elementary that a state may tax property used to carry on interstate commerce. But, as the

Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. . . . This tax cannot be sustained if it is not upon the property, but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

In *Crew Levick Company v. Pennsylvania*, 245 U. S. 292, 295, 296, 62 L. ed. 295, 298, the State of Pennsylvania imposed a license tax on each dealer in goods, wares and merchandise measured by a percentage of the volume of gross business transacted annually. The taxpayer had received orders for goods from foreign countries and had shipped the goods to those countries and contended that the license tax based on a percentage of the gross receipts from such sales to foreign countries was in violation of the commerce clause. In sustaining this contention the court, at pages 295, 295, said:

"but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent. . . . Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned.

The principle reliance of the commonwealth is upon *Ficklen v. Taxing District*, 145 U. S. 1, 36 L. ed. 601. . . . Besides, the tax imposed in the *Ficklen Case* was not directly upon the business itself or upon the volume thereof, but upon the amount of commission earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional. . . .

The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transaction. That it applies to internal as well as to foreign commerce cannot save it, for, as was said in *State Freight Tax Case*, 15 Wall. 232, 277, 21 L. ed. 146, 162; 'The state may tax if internal commerce, but if an Act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state.' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

The court further stated that the principle announced in the case was clearly distinguishable from the principle announced in the case of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. ed. 994; *U. S. Exp. Co. v. Minn.*, 223 U. S. 335, 347, 56 L. ed. 459, 466; *Baltic Min. Co. v. Mass.*, 231 U. S. 68, 58 L. ed. 127, 134, and *Kansas City*

etc. Co. v. Botkin, 240 U. S. 227, 60 L. ed. 617, which cases were relied upon by the District of Columbia in the court below.

A tax on gross receipts from interstate commerce has been held to be a direct burden on that commerce whereas a tax on the net income from interstate commerce is only an indirect burden.

Following the decision in the *Crew Levick* case, *supra*, the Supreme Court of the United States decided the case of *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, where it upheld the Wisconsin Income Tax Law which imposed a tax on the net income of the plaintiff's business, a substantial part of which was engaged in interstate commerce. The court expressly indicated that had the tax in that case been imposed upon the gross receipts from the sale of merchandise in interstate commerce that the tax would have been held invalid. The difference in effect between a tax on gross receipts and one on net income, as the measure, was stated to be that a tax on gross receipts

“affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; . . .”

In *James v. Dravo Contracting Co.*, 82 L. ed. — (No. 5 Adv. Op., p. 125), decided December 6, 1937, the court had before it the Gross Sales and Income Tax Law of West Virginia, which was upheld as applied to gross receipts from a construction contract by a foreign corporation performing construction work within the state. In announcing the principles of the foregoing cases and distinguishing them from this case, the court in a 5 - 4 decision said:

“Respondent invokes our decisions in the field of interstate commerce, where a tax upon the gross income of the taxpayer derived from interstate commerce has long been held to be an unconstitutional burden. . . . But the difference is plain. Persons have a constitutional right to engage in interstate commerce free from burdens imposed by a state tax upon the business which constitutes such commerce or the privilege of engaging in it or the receipts as such derived from it.”

In a similar case under the New York City sales tax (Local Law No. 24 of 1934), *National Cash Register Co. v. Taylor*, decided by the Court of Appeals of New York on November 23, 1937 (65 W. L. R. 1129), the city of New York imposed a tax of 2 per cent “upon the amount of the receipts from every sale in the city of: (a) Tangible personal property sold at retail,” etc. Section 2 of the law required the tax to be paid by the purchaser to the vendor. In this case the National Cash Register Co., which did business in New York City, kept in stock only standard machines manufactured by the company in Ohio. It excluded in its return of gross receipts, the proceeds received from special orders for machines not kept in stock in New York. Such orders are obtained in New York and a

cash deposit is received when the order is taken from a New York customer and the order is sent to Dayton, Ohio, where the article is made and shipped either to the company's office in New York or directly to the customer in New York. Because the receipts from such transactions result from interstate commerce the company claimed it was not required to pay a tax thereon and its position was sustained by the Court of Appeals.

The foregoing authorities establish several clearly defined propositions which, it is submitted, are decisive of the unconstitutionality of the Act involved herein.

1. The business of selling goods or produce to purchasers in other states requiring the transportation of such goods or produce across state lines is interstate commerce.

2. Although a local tax on gross receipts is valid in so far as intrastate business is concerned, a tax on the gross receipts of both is invalid.

3. Although a tax on net income from interstate commerce is valid, a tax on the gross receipts from interstate commerce is an unconstitutional burden thereon.

4. A tax for the privilege of engaging in business measured by gross receipts is a tax on the gross receipts and when such gross receipts arise out of interstate commerce, the tax is a tax on interstate commerce and, as such, an unconstitutional burden thereon.

5. The name asserted in the Act as the characterization of the type of tax is not decisive; if it be for any asserted purpose, it is unconstitutional if it operates as a tax on interstate commerce.

6. A state may not impose a tax as a condition to the privilege of engaging in interstate commerce. Such engagement is the exercise of a right, insofar as the state is concerned, and is not a privilege.

7. The District of Columbia Revenue Act of 1937 is a privilege tax, determined by the amount of gross receipts and, as such, is a tax on the gross receipts of interstate commerce and is, therefore, unconstitutional.

II.

The District of Columbia Revenue Act of 1937 violates the Due Process Clause of the Fifth Amendment of the Constitution.

A. The Act is Invalid Because of Retroactivity.

The District of Columbia Revenue Act of 1937 was approved on August 17, 1937 and immediately went into effect, requiring all persons then engaged in business to file a return showing the gross receipts from their business during the calendar year 1936 and required a tax to be paid equivalent to $\frac{2}{5}$ of 1 per cent of the gross receipts for the calendar year 1936, in order to obtain a license to continue in business from 60 days after August 17, 1937 to and including June 30, 1938. It was plain that during the year 1936 no suggestion was made about the subsequent passage of any such legislation. During that year business men in the District of Columbia, particularly the plaintiffs herein, engaged in business transactions into which they would not have entered had they been notified or had reason to believe during any part of the year 1936 that they would subsequently be called upon to pay a

tax on the basis of those transactions, irrespective of their profitable character, in order to continue in business during the following year. (R. 14, 15) This proposition is of particular importance in the present case since the plaintiffs' business is of such character that the same could have been operated with the same amount of administrative energy and success by simply changing the form of transaction from outright purchase and sale to transactions whereby they would receive wholesale fruit and produce on consignment and resell the same receiving approximately the same amount of net income. Those persons engaged in the fruit and produce distributing business who did not have capital invested therein and who were not able to engage in outright purchases and sales, but who transacted their business exclusively on a consignment basis, without the risk of investment, could well do business of the same gross amount as did the plaintiffs and yet not be subject to a tax on their gross sales. As applied to the plaintiffs herein the so-called gross receipts tax is the equivalent of a tax on gross sales as much as if each separate sale transaction were separately taxed. (R. 13, 14) The Act is therefore retroactive in its operation. Although it veils a title as a tax for the privilege of doing business for the balance of 1937 and part of 1938, it is truly a tax on the transactions of 1936.

For example, if A had gross receipts for 1936 amounting to \$100,000 and in 1937, before the Act was proposed or approved, shut down his business by voluntarily curtailing its volume so as to operate on an expectant gross receipts of \$20,000, under the terms of the Act he would be required to pay the tax based on \$100,000.

The converse is likewise true. The statute refuses to take into consideration any reasonable basis as a measure for the tax which might be commensurate with the so-called "privilege" which is granted but arbitrarily and retroactively taxes transactions completely past, which have no fair and reasonable relation with the activities during the taxable year. The benefit of the "privilege" conferred bears no reasonable relation to the basis for determining the amount of the tax.

In determining the authorities applicable to the instant case, it is submitted that the plaintiffs' position on the question of retroactivity would be markedly different if the tax imposed were to be determined by gross receipts for the year 1937, since only a part of the year had passed before the tax became operative. The earlier cases have variously characterized retroactivity in its proper limitations and have upheld taxes which were characterized as being of "limited retroactivity" and where only "part of the year had elapsed".

Stockdale v. Atlantic Insurance Co., 20 Wall. 323, 22 L. ed. 349.

Brushaber v. Union Pac. R. R., 240 U. S. 1, 60 L. ed. 493.

The more recent cases, however, tend to establish that where revenue raising legislation is enacted which refers to a period containing transactions which have been fully completed before the legislation was proposed or enacted, that such legislation is unconstitutional on the grounds of retroactivity.

In *Nichols v. Coolidge*, 274 U. S. 531, 71 L. ed. 1184, it was held that an Act of Congress requiring that there shall be included in the gross estate of a decedent, for

inheritance tax purposes, the value of property transferred by such decedent prior to its passage, merely because the conveyance was intended to take effect in possession after death, is "arbitrary, capricious and amounts to confiscation" because it related to transactions lawfully completed before the act was passed. The court did not propose to pass upon the validity of transfers made after the passage of the act. In limiting the decisions to transfers completed before the act went into effect the court, at page 542, said:

"An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars, both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. . . . This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment." (Citations.)

It is well established that the Fifth Amendment to the Federal Constitution is applicable in the District of Columbia.

Sims v. Rives, 66 App. D. C. 24.

Barry v. Hall, 98 F. (2d) 222 (No. 7049, U. S. Court of Appeals for the District of Columbia, decided May 26, 1938.)

To impose a tax which is dependent upon the form which transactions have taken after those transactions have been completed, is arbitrary and invalid under the Due Process Clause of the Fifth Amendment.

In *Untermeyer v. Anderson*, 276 U. S. 440, 72 L. ed. 645, a gift was made on May 23, 1924, and on June 2, 1924, Congress enacted legislation taxing such gift, which tax was imposed thereon. At the time the gift was made the bill was in conference in Congress and on the day before the gift was made, on May 22, 1924, the bill was reported to the Senate and three days later passed both Houses and was approved by the President on June 2, 1924. In holding the tax invalid, the court said, at pages 445, 446:

“The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures.”

In a strong dissenting opinion by Mr. Justice Brandeis, it was stated that no federal revenue measure had ever been held invalid for retroactivity except for the “peculiar tax” involved in *Nichols v. Coolidge*. In the dissenting opinion at p. 499, it was said:

“The need of the Government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship.”

However, in a subsequent case, *U. S. v. Hudson*, 299 U. S. 498, 81 L. ed. 360, Mr. Justice Brandeis apparently agreed with the majority opinion, where it was held that retroactivity renders a tax measure consti-

tutionally objectionable if it extends for an unreasonable period. In that case, also known as the Silver Purchase Act case, the period of retroactivity was only 35 days—from May 15, 1934, the effective date when the tax was made operative by the statute enacted on June 19, 1934—and the court said:

“For some months prior to this period there was strong pressure for legislation requiring increased acquisition and use of silver by the Government, and several bills providing therefor were presented to the Senate and House of Representatives. On May 22 the President sent to Congress a message recommending legislation for increasing the amount of silver in our monetary stocks and further recommending the imposition of a tax of at least 50% on profits accruing from private dealing in silver. The bill which became the Silver Purchase Act was introduced May 23 in response to this message. In these circumstances we think the period of retroactivity fixed in the act is not unreasonable, but consistent with the practice sustained by this Court in the cases already cited.”

In *Blodgett v. Holden*, 275 U. S. 142, 72 L. ed. 206, a state tax on succession was held invalid as applied to a gift to the donor's children involved in *Nichols v. Coolidge*, *supra*, because it was deemed to be a tax on a gift which had completely vested before the enactment of the taxing act or of any other law taxing that type of succession.

In *Milliken v. United States*, 283 U. S. 15, 75 L. ed. 809, objection was interposed to the validity of a decedent's estate tax provided for in the Revenue Act of 1918 on the ground that it was a denial of due process of law because of the retroactive nature of the tax. After reviewing cases already cited herein con-

denying retroactivity, the court said that a tax is not necessarily arbitrary and invalid under the Due Process Clause because retroactively applied and that taxing acts having retroactive features have been upheld "in view of the particular circumstances disclosed and considered by the court." The court said that the mere fact that the gift antedated the statute was not sufficient to hold it sufficiently retroactive, but that it is necessary to consider the nature of the tax and the subject matter involved in order to determine whether or not that character of retroactivity amounts to a deprivation of due process of law. In upholding the tax in the Milliken case the court said that the consideration involved did not justify holding that there was a denial of due process because at the time the gift was made there was then in force a prior act taxing such gifts although the subsequent rate provided for in the applicable Revenue Act of 1918 was greater. The court said:

"The decedent, when he made his gift, was as well warned that it might be taxed on that basis as he was that it would be so taxed if on that day he had made the same disposition of it by will. A change in the rate applicable to transfers at death necessitates a corresponding change in the rates applicable to gifts made in contemplation of death, else the purpose in taxing the latter would not be attained. . . . The present gift was subject to the excise when made; and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character."

It is submitted that the consideration accepted by the Supreme Court of the United States in the Milliken

case in refusing to hold the tax invalid on the ground of retroactivity, was of such a character as is clearly distinguishable from the case at bar. There, the gift made by the donor was already subject to tax. That gift was taxed according to subsequent legislation which changed the original taxing measure only in the rate of the tax. The donor had been forewarned that if he made such a gift he would be subject to taxation therefor. In the instant case, the plaintiffs had no knowledge whatsoever during the calendar year 1936 that if they bought an article for \$1,000 and sold it for \$1,100 that they would be called upon in the latter part of 1937 to pay a tax on \$1,100. Had they been forewarned they would not have entered into the transaction. Had they been forewarned they could have accomplished the same transaction by having obtained the goods on consignment; and, under the District of Columbia Revenue Act of 1937, if they had sold the article for \$1,100 and earned a \$100 gross profit, they would have been subject to a tax of $\frac{2}{5}$ of 1 per cent on \$100. Without such forewarning and in absolute retroactivity, plaintiffs were required to pay a tax on the full gross sales price.

B. The Act is Invalid Because It is Discriminatory and Arbitrary.

The claim that the Act is retroactive is closely interwoven with the objection that it is also discriminatory and arbitrary. It is assumed, as the evidence offered to be proved would have established (R. 14, 15), that if the plaintiffs had known or had reason to believe in 1936 that the tax provided for would be imposed in 1937 and 1938 on a basis where their business could save 90 per cent of the tax imposed by merely changing

the form of the transactions engaged in, they would have done so. There is no difference between a wholesale fruit and produce commission merchant and a wholesale fruit and produce dealer. As a matter of fact they are identical, except for the extent to which such business engages in consignment transactions on a commission basis. That difference in the form of transaction does not present a basis for distinction reasonably sufficient to justify the absolute divergence in burden cast upon the respective types of businesses under the Act as provided for in Title VI, Section 5, which imposes the tax of "2/5 of one percentum of the gross receipts in excess of \$2,000 derived from such business for the calendar year 1936: Provided, however, That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent" Since the business is so identical, the difference in rate is arbitrary and discriminates against the plaintiffs and persons similarly situated, whose business in 1936 was substantially outright purchase and sale and only nominally commission. (R. 11, 15.)

In *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. ed. 1054, it was held that a Kentucky statute which imposed an annual gross sales tax of 1/20 of one per cent upon the first \$400,000 of gross sales, the rate increasing on each \$100,000 of gross sales between \$400,000 and \$1,000,000 to 17/20ths of one per cent and one per cent of gross sales over \$1,000,000, amounted to an arbitrary classification of vendors, solely by reference to volume of business, and, therefore, was unconstitutional as a violation of the Fourteenth Amendment. The court held that the Act was not reasonably adjusted in amount in regard to substantial differences

in the nature of the privilege exercised. The state argued that a merchant's net income and his consequent ability to pay increases as the volume of his sales grows. The court said that this "argument does not advance the case for the validity of the statute. Even in this respect the classification is arbitrary, for the claimed relation of gross sales—the measure of the tax—to net profits fails to justify the discrimination between taxpayers."

By analogy, in the case at bar, the question is whether the completed form of a transaction in 1936 offers a sufficiently reasonable basis for a difference in tax imposed upon the plaintiffs and those who did business on a commission basis. No reasonable distinction exists except one of form, which is not so fundamental as to justify a variation in burden far greater than that presented in the *Stewart Dry Goods* case.

Likewise, a tax on the gross receipts of corporations operating taxicabs, when not imposed on individuals or partnerships engaged in the same business, was held unconstitutional under the equal protection clause of the Fourteenth Amendment in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927.

A classification for tax purposes must be based on a real and substantial difference having reasonable relation to the subject of the legislation.

General American Tank Car Corp. v. Day, 270 U. S. 367, 70 L. ed. 635.

Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989.

Quaker City Cab Co. v. Pennsylvania, *supra*.

Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. ed. 703.

Legislation by Congress may not deprive residents of the District of Columbia of their equal protection of the laws, even though express provision for equal protection only appears in the Fourteenth Amendment. *Lappin v. D. C.*, 22 App. D. C. 68, *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223.

In the dissenting opinion of Mr. Justice Brandeis in the *Quaker City Cab* case a reasonable classification for tax purposes is defined to be such a classification which "an informed, intelligent, just minded, civilized man could rationally favor . . . the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious or fanciful."

CONCLUSION.

It is respectfully submitted that Title VI of the District of Columbia Revenue Act of 1937 is an unconstitutional violation of the Commerce Clause of the Constitution and a violation of the Due Process Clause of the Fifth Amendment, as applied to the plaintiffs in error.

For these reasons, it is respectfully submitted that the judgment below for the defendant in error should be reversed.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1938

No. 7213

WILLIAM H. NEILD AND J. EMERSON SAUERHOFF,
co-partners, doing business under the name and style of
Neild & Sauerhoff, Plaintiffs in Error,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

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BRIEF ON BEHALF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

Title VI of the District of Columbia Revenue Act of 1937 (Public No. 314, 75th Congress, Sec. 970, Title 20, D. C. Code of 1929, Supp. III) imposes a tax for the privilege of engaging in business in the District of Columbia for the fiscal year 1937-1938. The Act was approved August 17, 1937, and all persons engaging in business in the District of Columbia on that date became subject to the provisions of Title VI. Section 4 of said title requires every person subject to the tax thereunder to furnish the Assessor of the District a statement, under oath, showing the gross receipts of the taxpayer during the preceding calendar year, and in Section 5 it is provided that:

“For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to

the collector of taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to two-fifths of 1 per centum of the gross receipts in excess of \$2,000 derived from such business for the calendar year 1936: *Provided, however,* That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

Pursuant to said provisions, plaintiffs reported gross receipts in the sum of \$141,723.70 (R. p. 11) and thereafter on January 3, 1938, paid the first semi-annual installment of the tax due in the amount of \$241.10, plus \$4.82 representing penalty of one per cent per month for failure to make payment when due (R. p. 12). Suit was instituted in the Municipal Court for recovery of the amount paid; judgment was entered for defendant and the matter is before this Court on Writ of Error.

Plaintiffs contend, first, that Title VI imposes an unconstitutional burden on interstate commerce and, second, that the Act violates the due process clause of the Fifth Amendment to the Constitution.

It appears that during the calendar year 1936 and since that time, the plaintiffs have maintained a place of business in the District of Columbia from which they have engaged in the buying and selling of fresh fruits and produce; that sales are made only to wholesalers and of the total sales reported (\$141,723.70) for the calendar year 1936, sales in the gross amount of \$77,044 were made to firms in the State of Virginia, while sales in the amount of \$64,679 were made to persons within the District (R. pp. 11, 15). In addition to receipts from the above sales, plaintiffs also received commissions in the approximate amount of \$2,000 (R. p. 15). After deduction of the exemption of \$2,000 allowed by the statute, the total amount of tax due was \$569.78 (R. p. 11).

Section 6 of Title VI provides that "Any tax levied by the District of Columbia upon tangible personal property (other than motor vehicles) for the fiscal year 1937-1938 and paid by such taxpayer shall be credited upon the tax due under this

title," and the plaintiffs were thereby allowed as a credit upon the first semi-annual installment of the business privilege tax due the sum of \$43.79, representing the amount theretofore paid as the first installment of taxes due for the fiscal year 1937-1938 on tangible personal property owned by plaintiffs (R. p. 2).

ARGUMENT

I

Commerce between the District of Columbia and an adjoining State is not interstate commerce within the meaning of the commerce clause of the Constitution.

Under Article I, Section 8, Clause 3, of the Constitution, the Congress of the United States is given power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The District of Columbia is not a State within the meaning of the Constitution. An Act of Congress, to be valid under the commerce clause, must be a regulation of commerce with foreign nations, or among the several States, or with the Indian Tribes. "If not so limited, it is in excess of the power of Congress." *Trade-Mark Cases*, 100 U.S. 96.

In the case of *Hooe v. Jamieson*, 166 U.S. 395, the court said:

"We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn v. Ellzey*, 6 U.S. 2 Cranch, 445, February term, 1805; 'that the members of the American confederacy only are the states contemplated in the Constitution;' that the District of Columbia is not a state within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a state."

Mr. Justice Miller, in his dissenting opinion in the case of *Stoutenburgh v. Hennick*, 129 U.S. 141, the majority opinion not expressly deciding this point, said:

"Unless the act for which Hennick was prosecuted in

this case was commerce with a foreign Nation, among the several States, or with an Indian Tribe, it is not an act over which the Congress of the United States had any exclusive power of regulation. * * *

"Commerce between a citizen of Baltimore, which Hennick is alleged to be in the prosecution in this case, and citizens of Washington, or of the District of Columbia, is not commerce 'among the several States,' and is not commerce between citizens of different States, in any sense. Commerce by a citizen of one State, in order to come within the constitutional provision, must be commerce with a citizen of another *State*; and where one of the parties is a citizen of a Territory, or of the District of Columbia, or of any other place out of a State of the Union, it is not commerce among the citizens of the several States."

In the cases of *Ex parte Hanson*, 28 Fed. 127, and *United States v. Whelpley*, 125 Fed. 616, district courts of the United States expressed doubt as to whether commerce between the District of Columbia or a territory on the one hand, and a state on the other, is interstate commerce within the meaning of the commerce clause.

The power of Congress to regulate commerce in the District of Columbia is not derived from the commerce clause but from Clause 17, Section 8 of Article I which gives the Congress the power "to exercise exclusive Legislation in all Cases whatsoever, over such District, (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."

El Paso & N. E. Ry. v. Gutierrez, 215 U.S. 87,

Hyde v. Southern R. Co., 31 App. D. C. 466,

Jefferson v. District of Columbia, 40 App. D. C. 381,

Atlantic Cleaners and Dyers v. United States, 286 U.S. 427, 434.

II

Even if Title VI of the Revenue Act of the District does impose a burden on plaintiffs' business carried on with persons outside the District, it is not for that reason unconstitutional.

Assuming, for the sake of argument, that commerce be-

tween the District of Columbia and an adjoining state is interstate commerce, we, nevertheless, contend that Congress, when legislating locally for the District of Columbia, is not restricted by the commerce clause of the Constitution.

Again assuming for the sake of argument that the tax imposed by Title VI, is a burden on interstate commerce and could not be constitutionally enacted by a state legislature, such assumption has no bearing upon this case. The lack of power in a state to impose such a tax results from a positive and specific prohibition found in the Constitution. Without such constitutional inhibition any state legislature could validly enact legislation imposing a tax upon interstate commerce.

There is no such restraint upon Congress. By the Constitution, it is specifically granted the power to legislate concerning interstate commerce. Clause 3 of Section 8 of Article I of the Constitution provides that "Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This precludes the States. But there is found in the Constitution no curtailment of that power when Congress is legislating locally for the District of Columbia.

Plaintiffs contend that local legislation for the District of Columbia by the Congress is subject to the limitations of the commerce clause of the Constitution of the United States in the same manner as is the legislature of a state, and in support of this contention they rely on *Beitzell v. District of Columbia*, 21 App. D. C. 49, and *Stoutenburgh v. Hennick*, 129 U.S. 141. The question here presented was not passed upon in either of those cases. In the *Stoutenburgh* case, the Supreme Court merely held that Congress had not delegated, and could not delegate, to the Legislative Assembly of the District (when the District had a territorial form of government) the power to require a license of commercial agents from outside the District whose business it was to offer merchandise for sale by sample. The power of Congress by direct legislation to require such a license was not in issue, and in that connection the Court observed:

"It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia because whenever Congress acts upon the subject, the regulations it establishes must constitute a system applicable to the whole country, but the disposition of this case calls for no expression of opinion upon that point."

As was said in *Parsons v. District of Columbia*, 170 U.S. 45:

"There is a wide difference between a tax or assessment prescribed by a legislative body, having full authority over the subject, and one imposed by a municipal corporation, acting under a limited and delegated authority.
* * *"

The *Beitzell* case turned on the question of *intention* and not upon the *power* of Congress to require a license of brewers' agents. Apparently there was no doubt in the mind of the court concerning the *power* of Congress. On page 59 it is stated:

"That Congress has express power, given by the Constitution, 'to exercise exclusive legislation in all cases whatsoever,' over the District of Columbia, thus combining the powers of the general and of a State government in all cases where legislation is proper, admits of no question. But whether Congress intended * * * to authorize the municipal authorities of the District of Columbia to tax agents representing the owners of property and business *outside* of the District, for the privilege of *soliciting orders* within it, as agents of such owners, for property to be shipped to persons within the District, is a question of very great doubt."

The Court found that the Act in question was not *intended* to regulate commercial intercourse between the District of Columbia and the States of the Union and added that, "it would seem to be reasonable to presume that if it had been the *intention* of Congress to make the provision of the act apply to soliciting agents for the owners of goods beyond the District, that *intention* would have been expressly declared, and not left to doubtful construction." [Italics added.]

Plaintiffs also rely upon the decision of this court in the

case of *Potomac Electric Power Co. v. Hazen, et al.*, 67 App. D. C. 161, 90 Fed. (2d) 406, where it was said: "They (the Commissioners of the District of Columbia) concede, as of course they must, that a tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause." But the Commissioners did not concede, and this Court did not hold, that Congress, in legislating for the District, could not impose a burden upon commerce between the District and a State. It is apparent from the authorities cited that this Court was referring only to State legislation. There is no indication that this Court intended to overrule its prior decisions which we now discuss.

In the case of *Hyde v. Southern R. Co.*, 31 App. D. C. 466, this Court had for consideration the first employers' liability act which was applicable to every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between the District of Columbia and any State, etc. Although the act had theretofore been declared unconstitutional in so far as it extended to injuries received in a state, it was held valid as applied to injuries received in the District of Columbia. In defining the power of Congress to legislate for the District of Columbia, the opinion states:

"* * * the power of Congress in the District of Columbia is *plenary*, and extends to the regulation of *all commerce of whatsoever nature* that may be carried on within its boundaries; and the act expressly applies to all employees of common carriers in said District without regard to the character of the commerce engaged in. If, therefore, the operation of the Act had been confined by its terms to the District of Columbia and the Territories, there could be no doubt of its constitutionality. This power cannot be exercised in a State, but is restricted to the regulation of commerce among the several States."
[Italics added.]

In *El Paso & N. E. Ry. v. Gutierrez*, 215 U.S. 87, it was held that the power of Congress to regulate commerce in the District of Columbia and the Territories is plenary and does not depend on the commerce clause; that an act of Congress may

be unconstitutional as measured by the commerce clause, and constitutional as measured by the power to govern the District of Columbia and the Territories. Referring to the *Hyde* case, the Court said:

"While not binding as authority in this court, we may note that the act, so far as it relates to the District of Columbia, was sustained in a well-considered opinion by the Court of Appeals of the District of Columbia. *Hyde v. Southern Ry. Co.*, 31 App. D. C. 466."

The effect of the *Hyde* case on legislation concerning the District of Columbia will be understood from a study of the case of *Jefferson v. District of Columbia*, 40 App. D. C. 381, involving the liability of an owner of a vessel on the waters of the Potomac for the sale of intoxicating liquors thereon without a license. This Court, in answer to the contention that liability for the sale of intoxicating liquor under the local law did not result because the vessel was engaged in interstate commerce, had this to say:

"That the vessel on which the acts claimed to be unlawful were committed may have been engaged in interstate commerce is of no weight in this determination, because the power of Congress in the District of Columbia is plenary and extends to all commerce of whatsoever nature that may be carried on within its boundaries. *Hyde v. Southern R. Co.*, 31 App. D. C. 466-470."

If Congress, in legislating for the District of Columbia, possesses only the power of a State legislature, and, therefore, like a State, is limited by the commerce clause of the Constitution, it would necessarily follow that Congress would be bound by all other constitutional limitations upon a State, including the provisions of the 14th Amendment. But the Supreme Court of the United States has held otherwise.

In the case of *Wight v. Davidson*, 181 U.S. 371, there was involved the validity of an assessment for benefits levied in a condemnation proceeding under an Act of Congress relating solely to the District of Columbia. This Court had quashed the assessment, relying upon its construction of the decision in the case of *Norwood v. Baker*, 172 U.S. 269, where it was

held the assessment there involved violated the 14th Amendment. The Supreme Court, in holding the assessment in the *Wight* case valid, said:

"In the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the 14th Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Constitution of the United States, which provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the 5th Amendment, and maintaining the validity of the acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the 14th Amendment as controlling state legislation."

Thus it will be seen that the Supreme Court has held that an Act of Congress relating to the District of Columbia is valid, even though it might contravene the provisions of the 14th Amendment.

If Congress, in legislating for the District of Columbia, should be held to act solely as a state legislature, and, therefore, bound by the provisions of the Constitution restricting the powers of the states, it would follow that congress, when so acting, would not be limited by the constitutional guaranties contained in the bill of rights which are applicable solely to the Federal Government. And yet it has been held that one charged with violating a criminal statute of the District of Columbia is entitled to trial by jury (*Callan v. Wilson*, 127 U.S. 540; *District of Columbia v. Colts*, 282 U.S. 63), although it has also been held that jury trial may be abolished in the states, (*Jordon v. Massachusetts*, 225 U.S. 167, 176; *Maxwell v. Dow*, 176 U.S. 581). So also it has been held that one charged with an infamous crime created by an Act of

Congress relating solely to the District of Columbia is entitled to an indictment by a grand jury (*United States v. Moreland*, 258 U.S. 433), although the grand jury may be abolished by the states (*Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, 277 U.S. 81). While one charged with crime in the District of Columbia may not be twice put in jeopardy of life and limb (*Steck v. United States*, 56 App. D. C. 368), this is not true in the States (*Palko v. Connecticut*, 302 U.S. 319). The constitutional guaranty against self-incrimination, while it applies to the District, does not apply to the states (*Twining v. New Jersey*, 211 U.S. 78).

It would seem strange indeed that the framers of the Constitution could have intended that Congress, which, under that instrument, is given power to regulate interstate commerce, should, when legislating for the District of Columbia, be limited by a clause which grants it power.

By way of analogy it may be remarked that the Supreme Court of the United States has held that the plenary power granted to the States by the 21st Amendment to the Constitution to control the importation of intoxicating liquors is not limited either by the commerce clause or the equal protection clause of the Constitution.

In *State Board v. Young's Market Co.*, 299 U.S. 59, it was held "that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee."

In the case of *Mahoney v. Triner Corp.*, 304 U.S. 401, the court sustained a statute of a State which prohibited the importation into the State of any brand or brands of intoxicating liquors unless such brand or brands was duly registered in the Patent Office of the United States.

III

The method of determining the tax, namely, by measuring it by gross receipts for the calendar year 1936, does not make said title unconstitutional.

In support of their contention that Title VI is retroactive,

plaintiffs rely on *Nichols v. Coolidge*, 274 U.S. 531; *Untermeyer v. Anderson*, 276 U.S. 440, and *Blodgett v. Holden*, 275 U.S. 142. In the *Coolidge* case it was held that the transfers there in question were not testamentary in character and therefore not subject to the provisions of the Federal Estate Tax. In the two other cases it was held that the provisions of the Revenue Act of 1924 were inapplicable to bona fide gifts not made in anticipation of death and fully consummated prior to the approval of the Act. The decisions add no support to the plaintiffs' contentions regarding the retroactivity of Title VI.

Section 5 of Title VI of the District of Columbia Revenue Act of 1937 provides:

"For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to the Collector of Taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to two-fifths of 1 per centum of the gross receipts in excess of \$2,000, derived from such business for the calendar year 1936."

The provision in question is retrospective. It is not retroactive. It requires the taxpayer and the taxing authorities to look back to the year 1936 for a measuring stick, so to speak, to determine the tax for the privilege of doing business for the fiscal year 1937-1938. That it is not retroactive will be seen by supposing that the plaintiffs, although in business in 1936, had discontinued their business before the effective date of the Act. In such case, no tax could be imposed on their gross receipts for the year 1936, under Title VI.

"In apportioning the tax between individuals there is no valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year instead of upon an estimate of the business for the year to come. So where taxes are levied for a series of years upon the same valuation of property, they are necessarily retrospective, but not therefore incompetent." *Cooley Taxation*, Fourth Edition, Vol. 2, Page 1157.

However, even if it could be said that Title VI was retroactive in effect, it would not for that reason be void or unconstitutional. In a recent case in the Supreme Court, *United States v. Hudson*, 299 U.S. 498, 500, 501, that Court stated the rule to be as follows:

"As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause in the Constitution. *Stockdale v. Insurance Cos.*, 20 Wall. 323, 331, 332, 341; *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 20; *Lynch v. Hornby*, 247 U.S. 339, 343; *Cooper v. United States*, 280 U.S. 409, 411. And see *Milliken v. United States*, 283 U.S. 15, 21. The cases on which the Court of Claims partly rested its decision were both examined and distinguished in *Cooper v. United States* and *Milliken v. United States*."

It will be observed that the Supreme Court cited with approval and as still controlling the decisions of that Court in *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 323, 331, and *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 20.

In *Stockdale v. Atlantic Ins. Co.*, 20 Wall. 323, 331, the Court sustained an income tax measured by the income for the preceding year.

In the later case of *Brushaber v. Union Pacific R. Co.*, *supra*, which has come to be regarded as one of the leading cases on taxation, the Supreme Court, after disposing of the question of the necessity of apportionment of the tax, with which the Sixteenth Amendment dispensed, had this to say as to the retroactive feature of the tax:

"* * * and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in *Stockdale v. Insurance Companies*, 20 Wall. 323, 331, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

"The right of Congress to have imposed this tax by

a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.' "

It is therefore clear that Title VI cannot be successfully assailed by any claim of alleged retroactivity.

IV

Title VI is not unconstitutional because a different method of measurement of the tax is employed with respect to commission merchants and wholesalers.

In support of their contention that Title VI is discriminatory and arbitrary because a different method of measurement is employed with respect to commission merchants and wholesale dealers, plaintiffs rely on *Stewart Dry Goods Company v. Lewis*, 294 U.S. 550. The Kentucky statute there under consideration imposed an annual gross sales tax of 1/20th of 1% upon the first \$400,000 of gross sales, the rate increasing on each \$100,000 of gross sales between \$400,000 and \$1,000,000 to 17/20th of 1%, and to 1% on gross sales over \$1,000,000. The operation of the statute was held to be unequal and arbitrary for the reason that it exacted from two persons different amounts for the privilege of doing exactly similar acts *because one had performed the act oftener than the other* and because the tax on a merchant's first sale, his thousandth sale, and his last sale of the year would be at different rates. The decision has no application here.

A wholesaler buys merchandise, takes title in his name, and sells for his own account. A commission merchant or a commodity broker merely acts as an agent or factor of the owner of the merchandise and sells for the owner's account, and receives a commission for his services.

Sub-section (c) of Section 1 of Title VI defines "gross re-

ceipts" as "gross receipts received from any business in the District of Columbia, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor or services or other costs, interest or discount paid, or any expense whatsoever." This definition applies to the gross receipts of all persons, including wholesalers, who buy merchandise or commodities and resell the same. In a later portion of sub-section (e) it is provided: "That in connection with commission merchants * * * the term 'gross receipts' shall be deemed to mean the gross amount of such commissions * * * received by them."

There is nothing unconstitutional in the distinction drawn in Title VI, as above stated. As was said by the Court of Appeals in *Potomac Electric Power Co. v. Hazen, et al.*, 67 App. D. C. 161, 90 F. (2d) 406, "There being no violation of the Constitution, Congress, of course, may select the subjects of taxation and tax them differently as it sees fit. *Crooks v. Harrelson*, 282 U.S. 55, 61; *Lang v. Commissioner*, 289 U.S. 109, 113."

In *Crooks v. Harrelson, supra*, is found this statement:

"But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; * * *."

And likewise in *Lang v. Commissioner, supra*:

"Unless there is a violation of the Constitution, Congress may select the subjects of taxation and tax them differently if it sees fit. * * *."

Flint v. Stone Tracy Co., 220 U.S. 107, is perhaps the leading case on the subject of taxation of business. Certain it is that it has been quoted more frequently than any other case on that subject. In that case the question of discrimination came up for settlement with respect to taxes imposed on business corporations. On pages 158, 159, 160 and 161 the correct rule is stated as follows:

"In levying excise taxes the most ample authority has been recognized from the beginning to select some and

omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see cases in the margin, decided in this court upholding the power.

"Many instances might be given where this court has sustained the right of a State to select subjects of taxation, although as to them the Fourteenth Amendment imposes a limitation upon state legislatures, requiring that no person shall be denied the equal protection of the laws. See some of them noted in the margin.

"In *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U.S. 232, dealing with the Fourteenth Amendment, which in this respect imposes limitations only on state authority, this court said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution."

And, on page 165, the Court said:

"* * * Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations."

On page 167, it is further stated:

"We must not forget that the right to select the meas-

ure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. 'It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.' *Patton v. Brady*, 184 U.S. 608, *McCray v. United States*, 195 U.S. 27, 58, and previous cases in this court there cited."

In *Brushaber v. Union Pacific R. Co.*, *supra*, the Court said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat v. White*, 181 U.S. 264; *Patton v. Brady*, 184 U.S. 608; *McCray v. United States*, 195 U.S. 27, 61; *Flint v. Stone Tracy Co.*, *supra*; *Billings v. United States*, 232 U.S. 261, 282."

In the case of *Gibbons v. District of Columbia*, 116 U.S. 404, the Court said:

"* * * In the exercise of this power, Congress, like any State Legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

So it will be seen that there is nothing of merit in the contention that the difference in the method of determining the tax with respect to the businesses of wholesalers and commission merchants is unconstitutional.

V

Plaintiffs have failed to prove what portion, if any, of their receipts were earned outside the District.

It is plain that Congress in Title VI of the Revenue Act of 1937, did not intend to levy a tax upon gross receipts earned in business outside of the District of Columbia. The term

"gross receipts" is defined in section 1 of the Title as follows:

"(e) The term 'gross receipts' means the gross receipts received from any business in the District of Columbia
* * *"

But Congress did intend to tax all gross receipts received from business in the District of Columbia. Plaintiffs' sole place of business is located in this District. From this location all produce is sold and delivered. Here the goods are stored, the books are kept, the collections made, and the affairs of the partnership conducted. The business of the partnership is situated in the District and its property is protected by District laws. A part of the tax paid by plaintiffs was measured by gross receipts received from business conducted solely within the District of Columbia and the validity of the tax upon those receipts cannot be disputed.

Section 5 of Title VII of the Revenue Act of 1937 provides as follows:

"Sec. 5. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby."

A portion of the business of plaintiffs was conducted partly within the District and partly without the District and even if the District, under the statute, is not entitled to tax the entire receipts therefrom, there would seem to be no doubt but that the District is entitled to tax so much of such receipts as was earned in the District.

In the case of *James v. Dravo Contracting Co.*, 302 U.S. 134, which involved a gross receipts tax levied by the State of West Virginia, where it appeared that work had been performed partly in that State and partly in Pennsylvania, it was held, under the authority of *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, that the tax could be apportioned between the two States.

In the last mentioned case the Court, in referring to other decisions of the Court, said:

"These decisions are not authority for the conclusion

that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State. In the *Underwood* case, it was not decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the *Bass* case, that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the *Underwood* case, 'for all that appears in the record, reached, and was meant to reach, only the profits earned within the State.' "

The difficulty with plaintiffs' position in this case is that they proceeded in the Court below upon the theory that Congress could not levy a tax upon any of their gross receipts derived from transactions conducted partly within the District and partly without the District. Had the plaintiffs, in the Court below, offered evidence upon which the Court could have found to what extent plaintiffs' gross receipts should have been allocated to the District and the extent, if any, its gross receipts should have been allocated elsewhere, it might well be that plaintiffs would be entitled to recover so much of the tax as was measured by gross receipts earned from business outside the District. In other words, from the decisions above cited, the mere fact that a transaction is conducted partly within and partly without the District does not exempt it from all taxation. It is only exempt to the extent that the gross receipts from that business may be allocated to another jurisdiction. The plaintiffs have failed to offer any evidence upon which the court could have determined what portion, if any, of the gross receipts was derived from sources without the District.

The case of *Adams Manufacturing Co. v. Storen*, 304 U.S. 307, is not in point. In that case was involved the validity of a statute of Indiana which the Supreme Court of that State had held imposed a tax upon the gross income of every resident of that State irrespective of whether the business was conducted within or without the State. The decision of the State Court was rendered in a suit for a declaratory judg-

ment. The Supreme Court of the United States held that the statute, since it was construed by the State Court to include "in its measure, without apportionment, receipts derived from activities in interstate commerce," was to that extent void. The case was remanded to the State Court for further proceedings not inconsistent with the opinion. Here, as before pointed out, it is plain that Congress did not intend to tax receipts earned from business conducted beyond the territorial limits of the District.

CONCLUSION

For the reasons stated above it is respectfully submitted that the judgment of the court below was correct and should be affirmed.

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